Supreme Court, U.S.
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No. 91-7358

In The

Supreme Court of the United States

October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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8/24/90	ORDER to proceed ifp – leave granted. Motion (Petition) for Writ of Habeas Corpus Motion by Petr. for Appt. of Cnsl.
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4/11/91	Notice of appeal by respd of order 3-13-91.
4/17/91	Motion for stay by Respondent Brief in support of Respondent's mo for stay
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6/4/91	Copy of Respt's Mo to stay District Court's opinion
6/13/91	ORDER from USCA that dist crt's order releasing petr is hereby temporarily stayed until 6-14-91.
6/20/91	Judgment
6/21/91	ORDER from USCA that mo is GRANTED and dist crt order of 3-13-91 is STAYED pending appeal.
12/5/91	ORDER from USCA that dist. crt is REVERSED.
12/13/91	JUDGEMENT entered denying petr's petition for writ of Habeas Corpus.

United States Court of Appeals
for the Seventh Circuit

4/15/91	State Prisoner's habeas corpus case docketed Filed Appellant Gordon A. Abrahamson jurisdictional statement
4/29/91	Filed Notice of Non-Involvement by attorney Stan Thomas for Todd A. Brecht
5/29/91	Filed motion by Appellant Gordon A. Abrahmason [sic] for stay of district court's opinion and order granting habeas corpus relief dated 3/13/91, pending appeal.
5/31/91	ORDER: Prof. Allen E. Shoenberger is hereby Appointed to represent Todd A. Brecht per Criminal Justice Act. ORDER: Filed clerk's notice to Todd A. Brecht to file O&3 copies of response to Respondent's "Motion to Stay

District Court's Opinion and order Granting Habeas Corpus Relief Dated March 13, 1991, Pending Appeal" filed on 5/29/91.

6/17/91 ORDER. Argument set for Wednesday, July 10:1991 at 9:30 am.

6/18/91 ORDER issued GRANTING motion for stay pending appeal and the district court's order of 3/13/91 is STAYED pending appeal. It is further ordered that this appeal will be expedited for argument and disposition. This appeal will be set for oral argument on 7/10/91. ORDER: This appeal will be expedited for argument and disposition. The following briefing schedule is hereby adopted: The appellee(s) brief is due on or before 6/24/91 for Todd A. Brecht. The reply brief if any is due on 7/1/91 for Gordon A. Abrahamson.

9/26/91 Filed opinion of the court by Judge Easterbrook. REVERSED. Cudahy, concurring. Easterbrook, Pell. ORDER: Final judgment, REVERSED.

10/10/91 Filed 25c Petition for Rehearing with Suggestion for Rehearing enbanc [sic] by Todd A. Brecht.

11/20/91 ORDER: Appellee Todd A. Brecht petition for rehearing with suggetion [sic] for rehearing en banc is DENIED.

6/17/92 Judgment filed from Supreme Court. Motion to proceed in forma pauperis is granted: and the petition for writ of certiorari is granted (limited to question I by the petition).

* * *

CIRCUIT COURT OF BUFFALO COUNTY, WISCONSIN

Excerpts from transcript of proceedings:

Opening Statement by Defense Attorney, Mr. Ridgeway:

* * *

Todd decided to work outside and he did some wood loading and unloading and he pulled some flowers in the front of the house. Then he went over to the wood pile and he came back inside for awhile and at some point during the day he did slip – he had some beer, he did drink. The evidence will show that he was not intoxicated but he did have something to drink.

Later on in the afternoon he was sitting around in the house and Mr. Brecht looked in the closet. He saw the .22 sitting in the closet and he decided to do something. He would go outside, take the .22 and shoot at some cans. There is going to be some physical evidence presented to you that was found at the scene. One item of physical evidence that will come into evidence is a Dr. Pepper can. It was found out in the back of the Hartman's yard someways down from the house. It has what appears to be at least one bullet hole through the can. Another piece of physical evidence, that will be at least one cartridge, empty cartridge shell that was found outside of the Hartman's residence, not inside of the Hartman's residence.

Well Mr. Brecht target shot with the .22 and he was going to continue target shooting with the .22 and he had loaded it, and propped it up by the house and went off and got a load of wood. Then Roger Hartman came home, at about the time that he normally does, and he was getting off work and realizing that Mr. Hartman had

come home Mr. Brecht realized two things: he realized that he shouldn't have had the gun out, and he had left the beer cans that he was drinking out of in the house – at least one of them was sitting out in plain view and he realized unfortunately that he had let Roger Hartman down, the rules laid down were that he wasn't to be drinking and he had had something to drink. He came back to the house, grabbed the gun and he rushed inside to put the gun back and to hide the beer cans and by this time Roger Hartman was coming down the stairs. He came in, as you can see in the diagram through a garage area, in an underneath area where there is a laundry room and an area that opens onto the hallway. He thought that Mr. Hartman had already turned the stairs into the hallway and gone into the den area as was his habit. He was going to go through the hallway up the stairs into the bedroom and put the gun back and get the beer cans out of the trash. What happened was as he rushed around the corner he had a problem – he fell – and you will hear testimony concerning the problem Mr. Brecht has with his foot, and that Molly Hartman was also aware of it and that was that there is a sensation of numbness, paralysis and some difficulty that he has in lifting his foot especially when he is moving rapidly. As he fell a terrible accident occurred – the weapon was in his hand and he grabbed at the gun as he fell onto one knee, and the gun was discharged. The evidence will show thta [sic] it struck Roger Hartman down low in the small of his back, and that it knocked Roger Hartman to the floor. Todd froze – he yelled, "Roger – ". Mr. Hartman seemed to see him and as he just sat there not believing that this gun had gone off, not believeing [sic] what had

happened, he is not sure how long it was but when he looked up Roger Hartman was gone. He doesn't know how, but apparently in some way Mr. Hartman had gotten back up and was no longer in the hallway. Mr. Brecht was now very upset, he thought that he should look for Roger and he went out into the den area. Roger Hartman was not in the den either. He stood in the den area for a minute and then he realized that he could have logically gone, as you can see in the diagram, is out onto the patio. He went out onto the patio and looked in the backyard area, which stretches down from the porch, and he did not see Mr. Hartman. At that point panic and fear started to seize him, and depression. He realized that he had hurt Mr. Hartman and he did not know how bad he had hurt Mr. Hartman. He realized that he had been drinking and that he had violated the rules, and he thought about putting another one of the bullets that he had for the target practicing into the gun and using it on himself. He attempted to load the gun in the same way he had attempted to load it and did load it when he was shooting the cans, and that was by opening the bolt on the gun and just sliding the bullet into the breech. His hand was shaking so badly that he couldn't even get the bullet into the gun, and finally he dropped it – and the evidence will show that it was found right there on the porch, with the bullet still in the gun.

I want to pause here because the physical evidence is also going to show that due to the testimony of the expert from the State Crime Laboratory, that this gun was not jammed – it did not misfire, and there were no misfirings on any cartridges, and that there was no way for this gun to – by loading it in a different fashion – there was no

way for this gun to jam, malfunction, or to have any difficulty. He will also testify that in his examination of this particular bullet in this particular gun, that there were no indications whatever that the bolt had slammed or slid forward in any way or put marks or indentations on that little bullet, as it would have if there had been for example a jam or if there was something wrong, so that the bullet could not be easily placed into the gun. In other words, that weapon was fully operable and fully operational at the time that it was found, and could easily have been used.

Now I am going to go back to the setting on the porch. Roger Hartman is gone and Mr. Brecht doesn't know where he is, or what he is going to do. He things [sic] for a minute and he decides, "I've got to look for Roger, I'm not sure how badly he's hurt." He runs up the stairs and not seeing him in the yard he runs up the stairs and he jumps into the Hartman vehicle and he knew that the keys were probably in the Hartman vehicle because he had used the Hartman vehicle just the day before to go up to Eau Claire, to drive back and now he knew that it was their habit to leave the keys in the car and so he jumped into the car and he started down the road to look for Roger Hartman, very slowly, and he didn't see him anywhere. He speeded up and he drove very rapidly, and he drove around through the area down below the bottom of the yard thinking perhaps Mr. Hartman had gone down the hill and you will see from the evidence that it is a very long sloping yard and that it slopes down and then goes out into a level area and then Highway 37 rounds out behind the back of the yard and then there is another embankment, an area over back of Highway 37. He will

testify that he drove down there and that he looked, and that he came driving back up looking where there was some brush and that he was driving past the house on Riverview Drive where the Hartmans live, and he didn't see Mr. Hartman until he had just approached the driveway coming back to the Hartman home. He was coming back towards the Hartman home and he saw Roger Hartman on the left side of the highway at the Seitz residence, neighbors of Roger and Molly Hartman, and he saw him going into the doorway of that residence and that he was standing up as he went in the doorway. At this point Mr. Brecht again panicked and instead of stopping he realized that Mr. Hartman had help and he realized that he had blown his situation and that he had blown the opportunity that the Hartmans had given him and his only thought was to take off – he didn't care where he went or where he was going or how he was going to get there but he took off in the car and he drove the car down the highway south and he did run the car into the ditch and he did go to Winona and he was there taken into custody by the Winona Sheriff's Department.

* * *

Now I am going to go back to the setting on the porch. Roger Hartman is gone and Mr. Brecht doesn't know where he is, or what he is going to do. He things [sic] for a minute and he decides, "I've got to look for Roger, I'm not sure how badly he's hurt." He runs up the stairs and not seeing him in the yard he runs up the stairs and he jumps into the Hartman vehicle and he knew that the keys were probably in the Hartman vehicle because he had used the Hartman vehicle just the day before to go up to Eau Claire, to drive back and now he knew that it

was their habit to leave the keys in the car and so he jumped into the car and he started down the road to look for Roger Hartman, very slowly, and he didn't see him anywhere. He speeded up and he drove very rapidly, and he drove around through the area down below the bottom of the yard thinking perhaps Mr. Hartman had gone down the hill and you will see from the evidence that it is a very long [sic] down from the porch, and he did not see Mr. Hartman. At that point panic and fear started to seize him, and depression. He realized that he had hurt Mr. Hartman and he did not know how bad he had hurt Mr. Hartman. He realized that he had been drinking and that he had violated the rules, and he thought about putting another one of the bullets that he had for the target practicing into the gun and using it on himself. He attempted to load the gun in the same way he had attempted to load it and did load it when he was shooting the cans, and that was by opening the bolt on the gun and just sliding the bullet into the breech. His hand was shaking so badly that he couldn't even get the bullet into the gun, and finally he dropped it – and the evidence will show that it was found right there on the porch, with the bullet still in the gun.

* * *

DIRECT EXAMINATION OF OFFICER ZELLER

[p. 332] Q Did you speak with this person?

A Yes.

Q What did you say?

A I asked him for his name, and I also asked him if he needed a wrecker, and where he was from.

Q What did he respond?

A He stated his name was Todd Brecht, and he stated that he was from Alma. In reference to the wrecker he said, "My sister will get a wrecker from Alma."

Q Did he say anything else?

A No.

* * *

DIRECT EXAMINATION OF
MELVIN SCHLESSELMAN

* * *

[p. 349] Q At any time during that period of time did he ever ask you to call and [sic] ambulance for anyone?

A No sir.

Q Did he ever ask you to call the police for him?

A No sir.

Q Did he ever mention a Roger Hartman to you?

A No sir.

MR. ZALESKI: I have nothing further.

* * *

CROSS-EXAMINATION OF OFFICER PAPKE
BY DEFENDANT'S COUNSEL

* * *

[p. 363] Q After you had taken him into custody he made a statement to you as you approached the squad car didn't he?

A Yes.

Q In fact he told you that it was a big mistake, he wanted to talk to someone?

[p. 364] A Yes he did.

Q He never explained further to you what he meant by "big mistake", did he?

A No he didn't.

Q Did he ever state to you who it was he wanted to talk to?

A Yes, he wanted to talk to – his words – detectives.

Q And when you got him to the station you did an inventory of what he had on his person is that correct?

A Yes it is.

Q He didn't have other than what you have mentioned in the inventory already, he didn't have any other personal items or personal effects with him?

A Other than those items you wil [sic] find listed on my inventory, no.

Q How much money did he have there?

A (NO ANSWER.)

Q You listed 25¢ on this inventory, is that the only money he had?

A That's the only amount of money that I can recall now.

Q Did he have any checks with him?

A Not that I recall.

Q Did he have any credit cards with him?

A Not that I recall.

* * *

RE-DIRECT EXAMINATION: OF OFFICER PAPKE

BY MR. ZALESKI:

[p. 366] Q Officer Papke did you or anyone else in your presence advise the defendant of his constitutional rights?

A No.

Q Now you stated he said it was a big mistake – did he say what was a big mistake?

A No he didn't.

Q Did he offer any explanation about anything whatever?

A No.

Q All he said was, "This is a big mistake."

A Yes.

Q What was the big mistake, what did you take that to mean?

MR. RIDGEWAY: I object, he is asking for speculation and a conclusion of the witness.

THE COURT: Sustained.

Q Did he say what he was referring to as being a big mistake?

A No.

Q Did he say that the arrest was a big mistake?

MR. RIDGEWAY: Objection, that's been asked and answered.

THE COURT: He may answer it, objection overruled.

[p. 367] A No he didn't.

Q Just that it was a big mistake.

A It was a big mistake.

Q Was he advised as to why he was being taken into custody?

A Yes he was.

Q Again you stated what?

A I told him he was sought by Buffalo County authorities for a shooting incident in Wisconsin.

Q Did he explain anything about a shooting incident to you?

A No he didn't.

Q To anyone else in your presence?

A Not to my knowledge, no.

MR. ZALESKI: I have nothing further.

* * *

CROSS EXAMINATION OF MR. BRECHT
BY MR. ZALESKI

* * *

[p. 605] Q Mr. Brecht, you stated this morning that you've got a few problems, is that not right?

A Yes I do.

Q Homosexuality?

A Yes.

Q Alcoholism?

A Yes.

Q And problems with the truth?

A Yes sir.

Q How long have you had problems with the truth?

A I really can't same [sic], it stems up threw some of my years.

Q You consider yourself a liar?

A At times, yes sir.

Q How long have you been a liar?

[p. 606] A I don't really consider myself a liar, but at times I do lie.

Q What is a liar, sir, is it a person who lies at times?

MR. RIDGEWAY: Objection, argumentative.

THE COURT: Sustained.

Q What is a liar, Mr. Brecht?

MR. RIDGEWAY: Objection, argumentative.

THE COURT: He is entitled to ask him what his definition of it is.

A A liar is somebody who lies all of the time, or doesn't tell the truth all of the time.

Q All of the time, or would a person be a liar if they didn't tell the truth some of the time?

A I guess they would be a liar if they didn't tell the truth some of the time also.

* * *

CROSS EXAMINATION OF MR. BRECHT.

* * *

[p. 617] Q Once you found out they were going to help you, you were going to start making an effort to

better yourself, and were you successful in telling the truth?

A I – probably not, I probably told some lies.

Q Are you still lying?

A Now sir?

Q Yes.

A No sir.

* * *

CROSS EXAMINATION OF MR. BRECHT
BY MR. ZALESKI:

[p. 674] Q Now you ran off the road, and a policeman – excuse me, first you talked to a young lady did you not?

A Yes I did.

Q You asked her for the way, or for a ride to the nearest city?

A Yes I did.

Q Did you tell her that Roger Hartman needed help?

A No.

Q Did you ask her to call an ambulance?

A No I did not sir.

Q Then the next person to show up on the scene is the Chief of Police from Fountain City?

A Yes it was sir.

Q Now you have a law enforcement officer there, is that correct?

A Yes I do sir.

Q I take it at that time you asked him to call an ambulance?

A No I did not sir.

Q You didn't tell him that you had accidently shot Roger Hartman?

A I did not say that, no.

[p. 675] Q You just said that your sister could call a wrecker for you?

A I said something to that effect, I believe so, yes sir.

Q How is [sic] sister going to do that if she is in Rochester, or was that a lie?

A Sir, I was not thinking clearly.

Q Was it a lie?

A Sir . . .

Q Was it a lie, was that a lie to Chief Zeller that you were going to have Molly call a wrecker for you?

A I guess it was.

Q Then you went to Mr. Schlesselman's house?

A I believe that was the gentleman that lived up in the house, yes.

Q You're 27 years did right?

A Yes.

Q And you've been convicted of one crime, and you called Mom –

A I – sir, there's no way to explain what happens when you accidently shoot somebody.

Q I might disagree with that, but we won't get into that at this time. Did you ask Mr. Schlesselman to call you an ambulance –

MR. RIDGEWAY: Objection, and I would [p. 676] move to strike the comment of Mr. Zaleski.

THE COURT: That will be stricken, and the jury will be instructed to disregard.

Q Did you ask Mr. Schlesselman to call an ambulance for Roger?

A No I did not sir.

* * *

[p. 677] Q Then Officer Papke approached you he not?

A I believe that was the officer's name, the officer did approach me, yes.

Q He asked you your name, and you refused to give it [p. 678] to him, is that correct?

A I believe I said, "It's Ron –", and he called my name and I said, "It's Ron, it doesn't matter."

Q Is Ron another alias that you used?

A No.

Q Why did you tell him that your name was Ron?

A I didn't want to get – I didn't want to be taken in by the police, I just wanted to explain to somebody what had happened.

Q Mr. Brecht, there's a law enforcement officer, the second one that you had encountered in about 20 minutes, right?

A I wanted to explain this to somebody that would understand me.

Q Oh I see, it had to be somebody who understood you before you would tell them that you shot Roger.

A I didn't mean it in that sense.

Q What did you mean?

A Somebody that I had known previous, that I had known.

Q You weren't going to tell just anybody that you had shot Roger Hartman and taken off in his wife's car, it had to be somebody who you had known previously?

A Sir, another reason I did not want to be taken into custody, I knew that Roger went through the door and I figured Roger got help sir.

[p. 679] Q You knew that you were in some trouble at this point didn't you?

A I believe so, yes sir.

Q And you were being awfully doggone selected as to who you were going to talk to weren't you?

A I guess I was, yes sir.

Q Chief Zeller didn't meet your criteria, you weren't going to tell him what happened right?

A I didn't say nothing to Mr. Zeller about it, no sir.

Q And I take it that Officer Papke did not meet your criteria, so you said nothing to him?

A I didn't say nothing to him, no sir.

Q So you were contacted by two law enforcement offices within a matter of about 20 or 25 minutes, and you never breathed a word of what happened at the Hartman residence, is that correct?

A No sir, I just said that it was a mistake.

Q You said that later?

A I said that as I was taken out of the mall sir as I recall it.

Q After misidentifying yourself.

A I eventually identified myself.

* * *

[p. 680] Q Later you correctly identified yourself after he did take you into custody?

A We were walking outside of the mall and the gentleman said, "You're Todd Brecht aren't you?" and I said, yes I am, and I believed that he was going to reach for my wallet or get my wallet out, and then I told him who I was.

Q At that time you told him what had happened, is that right?

A No, I did not tell him.

Q Did you ever tell any law enforcement officer that [p. 681] evening what had happened?

MR. RIDGEWAY: Objection your honor. I would like to be heard on that.

THE COURT: I am aware of what the basis of your objection is, and the objection is overruled, he may answer.

Q Did you ever tell any law enforcement officer that evening what had happened?

A I just said it was a mistake, I wanted to talk to somebody is what I said.

Q The place was crawling with cops wasn't it, at the Law Enforcement Center at Winona?

A There was a few officers there, yes.

Q You could have told any one of the officers what had happened.

A Yes I could have sir.

Q But you didn't did you?

A I did not.

Q In fact the first time you have ever told this story is when you testified here today was it not?

MR. RIDGEWAY: Objection your honor.

THE COURT: No, I am going to allow him to answer that question.

A You mean the story of actually what happened?

Q Yes.

[p. 682] A I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

* * *

[p. 720] Q Now regarding your contact while in the holding cell at the Winona Law Enforcement Center, did the jailer check on you?

A I don't know if there was one of those cameras, but I believe that there was a camera, or a window and I believe thta [sic] they checked on me periodically.

Q Did you tell anyone about what had happened in Alma?

A No I did not.

Q Again, with regard to Officer Papke, you told him that you wanted to talk to somebody, and you told Mr. Ridgeway that just a moment ago, but you didn't tell Officer Papke what happened?

A No I did not, I asked to see an attorney once, I remember that.

MR. ZALESKI: Nothing further.

* * *

INSTRUCTIONS TO JURY ON FIRST DEGREE MURDER

[p. 784] First degree murder, as defined in Sec. 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with intent to kill that person or another.

Before the defendant may be found guilty of murder in the first degree, the State must prove by evidence which satisfies you beyond a reasonable doubt that there were present the following two elements of this offense:

First, that the defendant intended to kill Roger Hartman.

Second, that the defendant caused the death of Roger Hartman.

Under the Criminal Code, the phrase "intent to kill" means the mental purpose to take the life of another human being. This intent to kill is the element of this offense that distinguishes it from all other degrees of murder. While the law requires, in order to constitute murder in the first degree, that the killing shall have been intended, it does not require that the intent to take human life shall exist for any particular length of time before the crime is committed, or that the killing should have been brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There may be no appreciable space of time between the formation of the intent to kill and the act of killing. If sufficient deliberation was had to form an intent to take life and to put that purpose into execution by destroying life, then there was a sufficient mental purpose to constitute murder in the first degree. The intention to kill, which is an essential

element of murder in the first degree, is no more or less than the mental purpose to take human life, formed on the instant preceding the fatal act or sometime theretofore, and which continued to exist at the time of the fatal act.

[p. 785] Intent to kill must be found as a fact before you can find the defendant guilty of first degree murder. You cannot look into a person's mind to find out his intent. You may determine such intent directly or indirectly from all the facts in evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate his state of mind. You may find intent to kill from such statements or conduct. You are the sole judges of the facts and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to kill.

Proof of motive to commit a crime is not necessary for a finding of guilt. The State is not required to prove motive, but motive may be considered in determining the guilt of a defendant. Mere proof of motive, on the other hand, does not of itself establish guilt. The presence or absence of motive is to be given just such weight as you believe it deserves.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant did commit an act of shooting which caused the death of Roger Hartman at the time and place charged in the information, and that at any time before doing such act the defendant had formed in his mind the purpose to take the life of Roger Hartman, and that of the act of shooting was

done by the defendant in pursuance of such mental purpose, then you should find the defendant guilty of murder in the first degree as charged in the information.

If you are not so satisfied, you must find the defendant not guilty of first degree murder, and you should consider whether the defendant is guilty of homicide by negligent use of a weapon in violation of Section [p. 786] 940.08 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree murder.

You should make every reasonable effort to agree unanimously on your verdict on the charge of first degree murder before considering the offense of homicide by negligent use of a weapon. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree murder, you should consider whether the defendant is guilty of homicide by negligent use of a weapon.

INSTRUCTIONS TO JURY ON HOMICIDE BY NEGLIGENT USE OF A WEAPON

[p. 787] Homicide by negligent use of a weapon, as defined in Sec. 940.08 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by a high degree of negligence in the operation or handling of a firearm.

Before the defendant may be found guilty of homicide by negligent use of weapon, the State must prove by evidence which satisfies you beyond a reasonable doubt

that there were present the following two elements of this offense:

First, that the defendant operated or handled a firearm in a manner constituting a high degree of negligence.

Second, that such high degree of negligence on the part of the defendant caused the death of Roger Hartman.

The first element of this offense requires that the defendant operated or handled a firearm in a manner constituting a high degree of negligence. The Criminal code provides that, "A *high* degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another."

To understand what constitutes a high degree of negligence, you should first consider what is meant by ordinary negligence.

A person is negligent when he fails to exercise ordinary care. Ordinary care is the degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances. A person fails to exercise ordinary care when, without intending to do any wrong, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person of another to an unreasonable risk of injury.

[p. 788] The conduct which constitutes "a high degree of negligence" is conduct that not only creates unreasonable risk of bodily harm to another, but also

involves a high probability that substantial bodily harm will result to such other person. "High probability" does not mean that the mathematical probability of the consequences occurring must be greater than 50 per cent. It means simply that the probability would be considered great by the ordinary person, having in mind all the circumstances of the case, including the seriousness of the consequences.

The second element of this offense requires that the defendant's use of the weapon in a manner amounting to a high degree of negligence caused the death of Roger Hartman. This requires that the relation of cause and effect must have existed between the death of Roger Hartman and such negligence on the part of the defendant. Before the relation of cause and effect can be found to exist, it must appear that the defendant's high degree of negligence was a substantial factor in producing the death.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant operated or handled the firearm in a manner constituting a high degree of negligence and that such high degree of negligence on the part of the defendant caused the death of Roger Hartman, then you should find the defendant guilty of homicide by negligent use of a weapon.

INITIAL CLOSING ARGUMENT BY MR. ZALESKI

[p. 791] MR. ZALESKI:

* * *

Now it's time for justice. This case is basically one of credibility. It is a question of who are you going to believe. Are you going to believe the State's case or are you going to believe the story the defendant tried to sell you in a not-so convincing fashion.

Now the State relies on circumstantial evidence. Now [p. 792] one of the big things I always worry about is what we pick up from television and movies and we say, "oh that guy got railroaded, convicted on circumstantial evidence," but you have to remember what the judge said "circumstantial evidence can be stronger than direct evidence at times," and is very competent evidence, and why: because how do you put a case together when there are only two witnesses and one is dead. If that's the case then any criminal, any killer can get by providing there isn't another live witness so you have to rely on circumstantial evidence.

As I said there were two witnesses to this case: the defendant and Roger Hartman, and the defendant killed the other witness.

* * *

[p. 793] The other thing we pick up from television a lot is the concept called motive. I want to talk about that head on because I'm sure a lot of you were thinking as this cased progressed and which came together more at the end: what was the defendant's motive for killing Roger Hartman? How many times did the defendant say,

no matter what you asked him, when you said, "did you call an ambulance," "no, I didn't, because Roger did so much for me." Every time he had a chance to get that shot in about how much Roger did for him, he was doing nothing but trying to sway your judgment, to show that there was no motive to kill Roger Hartman.

Whatis [sic] motive? Basically I think motive is something – it's a reason why somebody does something. Why do you get out of bed in the morning, why do you hold down a job, why do you make the decision to have a family, why do you decide to retire – it's a reason for doing something, however the problems with motive are simply that they are inside the actor's head and there is no way we can look inside of that actor's head and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence, and there aren't any CAT scans like we use for gall bladders or kidney stones or lungs to look inside of somebody's head to find out motive. We can't get inside of that head. That is specifically the reason why the law recognizes that the State doesn't have to prove a motive in a criminal case. Otherwise there would never [sic] [p. 794] convictions and there wouldn't be a United States, believe me.

* * *

[p. 796] As I said there were two witnesses to this offense, and one can't testify because he's dead but he left behind kind of a legacy of what happened in Todd Brecht. Who are you going to believe: a successful lawyer, businessman, 17 years District Attorney, Colonel in the Air Force Reserve, and a man strong enought [sic] to wage

and conquer a terrible battle against alcoholism that he was able to overcome many years ago.

* * *

[p. 800] Now we look at the defendant's story. I need a drink of water before we get at that one.

It's not unusual to have two glaring conflicts, on two sides of a trial. If there weren't we wouldn't have juries and [p. 801] we wouldn't spend all this money on courtrooms and everything else in criminal trials such as this. There are always two sides to it, otherwise there's no need for a trial. When there's a conflict what's the best thing to do, two things: you look at the demeanor, the way the witness acts on the witness stand in court and then you look at the physical evidence.

Let's look at this. The physical evidence doesn't lie. What is a lie, let's talk about the anatomy of a lie. One thing a person can do when there are certain physical facts, they can come in and deny them or when they're overwhelming you carefully tailor your story to fit with the facts as known to the State, or to anybody else for that matter, but you just give a different interpretation to it and that's specifically what this defendant did. Remember he made no statements to the law enforcement officers, James Zeller or the Winona Police. He sits back here and sees all of our evidence go in and then he comes out with this crazy story, that we're going to get into in some detail.

MR. RIDGEWAY: I think that's improper argument and I would object to it at this point.

THE COURT: It is closing argument, it's a characterization. He is entitled to express an opinion. The jury will make its own evaluation.

MR. ZALESKI: Look at what he said and look at how he [p. 802] acted. A week from Monday, one of my favorite nights of the year because I'm a movie buff, the Acadamy [sic] Awards are going to be one [sic], and I'll tell you right now Whoopie Goldberg for her role in the Color Purple doesn't have to worry about Todd Brecht giving her or anybody else any competition for an Oscar with that performance that he put on on the stand. I especially like the grave attempt to conjure up tears, his constant attempt at sobs up there, but did any of you see a single drop of salt water trickling down his cheeck [sic] – no, but he tried to put on a heck of a show. As I said every time he got a chance to say how wonderful Roger Hartman was he did it, but not a single tear no matter how hard he tried. Of course he only tried on direct examination, not cross-examination.

You know the funny thing about Mr. Brecht is, as bad as his credibility is, the only truthful thing he said this entire week is that he's a lier [sic]. That's kind of unusual isn't it. Todd Brecht had more stories to tell us than Imelda Marcos has shoes, folks, and it was destroyed immediately.

* * *

[p. 816] The police finally apprehend him in Winona, and does he say he's Todd Brecht, no. He says his name is Ron and it doesn't matter. Who is he talking to, mom. "Ron, it doesn't matter." He's just put a bullet hold through the back of the District Attorney and he won't

even identify himself to the Police. He'd rather let Roger crawl around with a gaping hole in his vena cava than even tell his name, or get any help for him. That's the type of guy Todd Brecht is.

He was on probation and he admits he wasn't supposed to leave the State and yet he left the State.

Now he's with Officer Papke and he tells him nothing, [p. 817] he's talking to mom, his name is Ron, and he finally gives his identity after Officer Papke says, "look buster we're going to find out no matter what.

Now he was then taken into Winona and they then find the 14 rounds of ammunition on him, and Officer Polus says he hears him talking on the phone to his step father, "it was a mistake, it was an accident, I didn't murder anyone." Why murder – a Freudian slip.

Mr. Ridgeway brought out the fact that he said he wanted to talk to somebody. Sure he wanted to talk to somebody. That's the sort of guy Todd Brecht is. He always wants to talk to somebody, until the opportunity presents itself. What did Officer Polus say he said, "I can't talk any more, there are a bunch of cops here." Who was he going to talk to. Remember who he would talk to, "someone who would understand." Here's a guy who's filled with problems, and we have to get the special cop who can understand Todd before he'll tell them that he just pumped a bullet through his brother-in-law. He can't tell anybody else. Todd's always a little special, he's "Peter Carrington."

* * *

[p. 822] Folks, just one last thing I want to talk to you aboutbefore [sic] I sit down. Roger Hartman's murder, he's charged with [p. 823] that, murder in the 1st degree. The court has also given you instructions on the lesser crime – the lesser crime of homicide by negligent use of a weapon. I want to look every one of you in the eye and tell you something: the State of Wisconsin, the people of the State of Wisconsin, don't want any verdict on Homicide by Negligent use of a Firearm.

Mr. Ridgeway and Mr. Brecht wouldn't mind that because it's a compromise verdict, it gives you an out . . .

MR. RIDGEWAY: I object to it as being characterized as that.

THE COURT: No, he can argue it, it's the jury that makes the decision.

MR. ZALESKI: It is nothing more than a compromise verdict. Maybe you'll be eight to four after a couple of hours, maybe ten to two, and you're getting tired and you say, "let's give him the lesser offense, he's a pathetic person," don't fall for that, don't fall for that please.

First of all as far as the State is concerned there is absolutely no basis on which to convict this man of that offense. If you believe his story I want him to talk [sic] out of this courtroom this afternoon a free man. I don't want any lesser crime. And think of what the judge instructed you on Homicide by Negligent use of a Firearm: it can't be just simple negligence, it has to be severe negligence, conduct resulting in [p. 824] a high probability of death or great bodily harm.

Are we going to penalize Mr. Brecht for having a bad foot. He carried the gun in like anyone would who was rational, muzzle up – yeah it was loaded, and I don't know how many of you folks are hunters but maybe you come home with the gun still loaded. It's not a good idea, but if you do, or you're working at it, and you carry it in the house, you carry it in in a safe position like this with the muzzle up, but because he's got a bad foot and he stumbles and it goes off should we make him a criminal. No, let him go. I want him out of this courtroom today if that's going to be your verdict. You know why, because that is not the way it should be. He committed this murder with deliberation and premeditation, for whatever reasons went through his mind. It's a clear-cut case of 1st degree murder and he's tried to sell you a real bill of goods with this story that he's come up with.

* * *

FINAL CLOSING ARGUMENT BY MR. ZALESKI

[p. 879] First of all there has not been a single piece of independent evidence received to corroborate anything Todd Brecht said from that witness stand. It is his cockamamie story that he wants you to believe and which is carefully woven as I said before, to fit in with all the State's evidence.

* * *

[p. 880] A 27 year old man acted like that and he wants you to believe that and exonerate him from this 1st

degree murder based on that story. There is no other evidence other than his story as part of the defense, nothing.

* * *

[p. 887] That reference to the "plan in Atlanta." I never meant to infer and I don't know where Mr. Ridgeway got that idea that they had a scheme to kill Roger Hartman, he and Mason. I never meant that. I don't know what this plan was in Georgia, and he obviously didn't tell us but the fact of the matter is from day one he was using the Hartmans.

* * *

[p. 888] He said he wanted to talk to the detectives. Well Polus and Papke weren't good enough. Seven guys on the Buffalo County Sheriff's Department, two of them are there with a warrant and does he say anything? Mr. Ridgeways said, "what would you say?" I know what I'd say, I'd say "hold on, this was a mistake, this was an accident, let me tell you what happened," but he didn't say that did he. No, he waited until he hears our story.

* * *

[p. 889] Folks I just want to pose a couple of questions to you: why did he violate his probation and run to Minnesota; why didn't he stop to help Roger and administer first aid; why didn't he call an ambulance; why didn't he run and get help from the neighbors; why didn't he tell Chief Zeller about this; why didn't he tell Melvin Schesselman about it; why did he carry the gun outside; why would Roger crawl away, and not let Brecht help him? If you were shot and this was an accident,

wouldn't you want the closest person to help you? Why would Roger yell not to let Grant and Molly near him? How could he trip on nothing; why would he lie to Chief Zeller about getting his sister to call a wrecker; why would he lie to [p. 890] Mr. Schesselman about where he was from and where he was going; how could Roger Hartman know it was a .22 calibur [sic] rifle – rifle mind you, unless he saw it; why would he be firing that gun at that time when he knows Roger is due home, when he knows what time when Roger gets home; why would a 27 year old person panic to that extent; why didn't he tell the Police about it being an accident; why did he refuse to identify himself to the Winona Police Department – I'll tell you why, because Todd Brecht is a murderer, a murderer in the first degree and we have to face up to it.

* * *

138 Wis.2d 158
STATE of Wisconsin.
Plaintiff-Respondent,

v.

Todd A. BRECHT, Defendant-Appellant.

No. 86-1317-CR.

Court of Appeals of Wisconsin.

Submission on Briefs Jan. 16, 1987.

Opinion Released March 17, 1987.

Opinion Filed March 17, 1987.

Review Granted.

Before CANE, P.J., and LaROCQUE and MYSE, JJ.

MYSE, Judge.

Todd Brecht appeals a judgment convicting him of first-degree murder with the use of a dangerous weapon, contrary to secs. 940.01 and 939.63(1)(a), Stats. Brecht argues that his conviction should be overturned because the state's comments on his post-arrest silence violated his constitutional right to due process of law and his privilege against self-incrimination. Additionally, Brecht contends that the trial court erred by admitting evidence of his homosexuality and concluding that should he introduce evidence of his nonviolent character, the state could introduce evidence of his prior worthless check convictions.[1] We agree that the state's comments on

[1] Brecht also argues that his conviction should be reversed because of the prosecutor's alleged prosecutorial misconduct. Because Brecht's conviction must be reversed on other grounds, we need not address this issue. *See State v. Hurd*, 135 Wis.2d 266, n. 5, 400 N.W.2d 42, n.5. (App.Ct. 1986).

Brecht's silence impermissibly infringed on his right to a fair trial and that the trial court erred in its evidentiary rulings. The judgment is reversed.

In 1985, Brecht was convicted in Georgia of felony theft. In October of that year, Brecht's sister, Molly Hartman, and her husband, Roger Hartman, paid the restitution imposed for Brecht's crime and obtained his release from jail and the transfer of his probationary supervision to Wisconsin. The Hartmans brought Brecht back to Alma, Wisconsin, to live with them until he could be placed in a halfway house.

On October 17, Brecht shot and mortally wounded Roger Hartman. Brecht fled the scene and did not summon medical assistance or attempt to aid Hartman. Later that day, Brecht was taken into custody in Winona, Minnesota, and was told that he was being held in connection with a shooting incident in Wisconsin. Brecht responded that "it was a big mistake" and thereafter remained silent.

Brecht was ultimately charged with first-degree murder. At trial, Brecht testified that on the day of the incident, he had been using one of Hartman's guns to shoot at a soda can. Brecht stated that when he saw Hartman pulling into the driveway, he ran into the house to replace the gun but tripped and fell causing the gun to discharge. Hartman was struck in the back. Brecht testified that the shooting was accidental and that he did not intend to harm Hartman.

Over defense counsel's objections, the prosecutor during cross-examination repeatedly questioned Brecht as to why he had not informed the arresting authorities that the shooting was accidental. With regard to Brecht's

silence when first taken into custody, the prosecutor asked:

> Q. And you were being awfully dog-gone selective [sic] as to who you were going to talk to weren't you?
>
> A. I guess I was, yes sir.
>
> . . . .
>
> Q. And I take it that Officer Papke did not meet your criteria, so you said nothing to him?
>
> A. I didn't say nothing to him, no sir.
>
> Q. So you were contacted by two law enforcement officers within a matter of about 20 or 25 minutes, and you never breathed a word of what happened at the Hartman residence, is that correct?
>
> A. No sir, I just said that it was a mistake.

Referring to Brecht's silence while being held by the Winona police, the prosecutor asked:

> Q. At that time you told him what had happened, is that right?
>
> A. No, I did not tell him.
>
> . . . .
>
> Q. Did you ever tell any law enforcement officer that evening what had happened?
>
> A. I just said it was a mistake, I wanted to talk to somebody is what I said.
>
> Q. The place was crawling with cops wasn't it, at the Law Enforcement Center at Winona?

> A. There were a few officers there, yes.
>
> Q. You could have told any one of the officers what had happened.
>
> A. Yes, I could have sir.
>
> Q. But you didn't did you?
>
> A. I did not.
>
> Q. In fact the first time you have ever told this story is when you testified here today was it not?
>
> . . . .
>
> A. You mean the story of actually what happened?
>
> Q. Yes.
>
> A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a change to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

Again, on its recross-examination of Brecht, the prosecutor questioned:

> Q. Did you tell anyone about what had happened in Alma?
>
> A. No. I did not.
>
> Q. Again, with regard to Officer Papke, you told him that you wanted to talk to somebody, . . . but you didn't tell Officer Papke what happened?
>
> A. No, I did not. . . .

In its closing argument, the state urged the jury to "remember that Mr. Brecht never volunteered until in this

courtroom what happened in the Hartman residence . . . he made no statements to the law enforcement officers . . . [h]e sits back here and sees all of our evidence go in and then he comes out with this crazy story. . . . " In its closing argument on rebuttal, the state asserted, "I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened' but he didn't say that did he. No, he waited until he hears our story."

Brecht argues that the state's comments on his post-arrest silence violated his constitutional right to due process of law and against self-incrimination guaranteed under the fifth and fourteenth amendments to the United States Constitution and art. I, sec. 8, of the Wisconsin Constitution. Each stage of Brecht's silence must therefore be analyzed in a constitutional light.

PRE-ARREST, PRE-MIRANDA SILENCE

As a starting point, we note that because no governmental action was involved, comments on Brecht's pre-arrest, pre-*Miranda* silence were permissible. *Jenkins v. Anderson*, 447 U.S. 231, 239-40, 100 S.Ct. 2124, 2129-30, 65 L.Ed.2d 86 (1980). Thus, the state could properly question Brecht, and comment to the jury, on his failure to aid Hartman or summon medical assistance, and his flight from the scene.

POST-ARREST, PRE-MIRANDA SILENCE

In *Fletcher v. Weir*, 455 U.S. 603, 606-07, 102 S.Ct. 1309, 1311-12, 71 L.Ed.2d 490 (1982), the United States Supreme

Court held that the states may adopt their own rules as to whether it is permissible to comment on a defendant's post-arrest, pre-*Miranda* silence. The Court reasoned that this inquiry did not violate due process because the defendant's silence was not induced by *Miranda* warnings informing him of his right to remain silent and implicitly assuring him that his silence would not be used against him. *Id.*

This reasoning seems predicated upon the dubious proposition that a defendant only invokes his right to remain silent after he is formally advised of his right. In a modern society with mass communications publicizing a defendant's constitutional right to remain silent, it is at least an arguable assumption that by remaining silent a defendant is relying upon his constitutional right to do so, even though he has not been formally advised of it. Regardless, this issue may be determined by each state under its own laws and constitution.

Our supreme court has indicated that comments on a defendant's post-arrest, pre-*Miranda* silence are impermissible. *See State v. Fencl*, 109 Wis.2d 224, 236-37, 325 N.W.2d 703, 710-11 (1982); *Reichoff v. State*, 76 Wis.2d 375, 378-80, 251 N.W.2d 470, 472-73 (1977). Because this holding rests upon a defendant's privilege against self-incrimination as guaranteed under the fifth amendment and art. I, sec. 8, of the Wisconsin Constitution, it is unaffected by the due process analysis employed in *Fletcher*. Any change from this position must properly emanate from our supreme court. *State v. Grawien*, 123 Wis.2d 428, 432 367 N.W.2d 816, 818 (Ct.App.1985).

On cross-examination, the state repeatedly questioned Brecht on his silence following his arrest and detention by the Winona authorities. The state not only commented on Brecht's silence, but vigorously argued that this silence was evidence that Brecht fabricated the accidental shooting story after the state had introduced all of its evidence. These comments on Brecht's post-arrest, pre-*Miranda* silence were impermissible. *See Fencl*, 109 Wis.2d at 236-37, 325 N.W.2d at 710-11.

The state attempts to justify its comments on Brecht's silence by claiming that he opened the door to such inquiry by testifying that he wanted to talk to someone about what happened and that "it was a mistake." It is true that a defendant's own testimony may permit the prosecutor to question him about his silence. *United States v. Shaw*, 701 F.2d 367, 384 (5th Cir.1983), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984). Brecht's statements, however, were made in response to the state's repeated questioning as to why he had never told any law enforcement officer that the shooting was accidental. In the face of such questions, it cannot be said that Brecht's responses permitted further inquiry, but, rather, that Brecht's statements were solely the result of improper questioning on his silence.

Because we conclude that the state's comments on Brecht's post-arrest, pre-*Miranda* silence were constitutional error, we must next determine whether that error was harmless beyond a reasonable doubt. *Fencl*, 109 Wis.2d at 238, 325 N.W.2d at 711. A court may find a constitutional error harmless if there is no reasonable possibility that the error contributed to the conviction. *Id.* In making this determination, a court applies a three-

pronged test that examines the frequency of the error, the nature of the state's evidence, and the nature of the defense. *Id.*

The frequency of the error involves not just a numerical computation but an examination of the comments within the context of the entire trial. The state asserts that the error was not prejudicial because, although the trial transcript totaled more than 900 pages, there were "only" three brief references in closing argument and inquiry during cross- and recross-examination of less than three pages. The question of prejudice, however, is not so easily answered.

The state's reference to Brecht's silence in both cross- and recross-examination went far beyond a simple inquiry as to his silence but involved a detailed recitation as to the various opportunities he had to explain the accident to a number of officer. This questioning led Brecht to testify that he wished to explain what had happened and the state's further exploration as to why he did not explain. Based upon the nature and length of the state's comments on Brecht's silence, and the vigorous nature in which his silence was argued as proof of his fabrication of an accidental shooting, we conclude that, under the frequency test, prejudice existed.

The second inquiry involves the nature of the state's evidence against Brecht. The state presented overwhelming and uncontradicted evidence the Brecht shot Hartman and caused his death. The disputed and ultimate issue was Brecht's intent at the time of the shooting. On this issue, the state relied entirely on circumstantial evidence. Accordingly, the state's comments on Brecht's failure to

inform the authorities that the shooting was accidental was highly prejudicial and may have unduly influenced the jury.

The final test for harmless error concerns the nature of the defense. Brecht contended that the shooting was accidental. His testimony regarding the circumstances of the shooting and his intentions at that time raised the issue of his credibility to a critical level. The state's argument that Brecht's silence was inconsistent with his testimony, and its use of his silence as an attack on his credibility, also contributes to the danger that Brecht was prejudiced by this error.

POST-ARREST, POST-MIRANDA SILENCE

Whatever latitude the state may have in regard to commenting on a defendant's post-arrest, pre-*Miranda* silence, no such latitude exists in regard to silence following arrest and *Miranda* warnings. Such silence is constitutionally protected, and any comment thereon violates a defendant's due process right to a fair trial. *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 638-39, 88 L.Ed.2d 623 (1986).

It is unclear from the record whether Brecht was informed of his *Miranda* rights when first taken into custody. The record does demonstrate, however, that Brecht was informed of these rights at his initial court appearance. The state's assertions in closing arguments that Brecht first volunteered his accidental shooting story after the state had presented its evidence were comments

on Brecht's post-*Miranda* silence. Those comments violated Brecht's right to due process of law. *See Wainwright*, 106 S.Ct. at 638-39.

The prosecutor's comments on Brecht's post-arrest, post-*Miranda* silence were also prejudicial. Although the comments were infrequent, Brecht's credibility was undermined by the prosecutor's suggestion that his continued silence was proof that he had fabricated the accidental shooting story after hearing the state's evidence against him. In a first-degree murder prosecution in which intent is established solely by circumstantial evidence and the defendant's credibility is a critical issue, impermissible comments that attack credibility heighten the danger or prejudice. *See Reichoff*, 76 Wis.2d at 381-82, 251 N.W.2d at 473-74. Because the defense relied heavily upon Brecht's credibility and because the prosecutor's comments were clearly improper, we conclude that the comments on Brecht's post-arrest, post-*Miranda* silence were prejudicial.

In summary, we conclude that the state's comments on Brecht's silence constituted prejudicial error. We therefore conclude that Brecht's conviction must be reversed.

Brecht contends that his conviction should be reversed on several other grounds. Because addressing these issues may be helpful on any retrial, we will examine these contentions.

Brecht argues that the trial court erred by admitting evidence of his homosexuality. The admission of this evidence was predicated upon Hartman's disapproval of Brecht's lifestyle and his communication of this feeling to

Brecht. An argument between the two concerning Hartman's attitude would provide Brecht with a possible motive to shoot Hartman. The state expected Hartman's wife, Molly, to testify that Hartman had informed Brecht of his feelings concerning Brecht's lifestyle. During the trial, however, Molly specifically denied that Hartman had ever communicated his disapproval of Brecht's homosexuality to Brecht.

We recognize that a trial court has broad discretion in determining the relevancy and admissibility of proffered evidence. *State v. Pharr,* 115 Wis.2d 334, 342-45, 340 N.W.2d 498, 501-03 (1983). A trial court's determination of relevancy will be upheld unless it constitutes an abuse of discretion. *Id.* at 342, 340 N.W.2d at 501. A reviewing court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination. *Id.*

Although evidence of motive is not an element of the crime charged, it is admissible if it meets the relevancy standards of sec. 904.01, Stats.[2] *State v. Phillips,* 99 Wis.2d 46, 54, 298 N.W.2d 239, 243 (Ct.App. 1980). This statute has been interpreted to mean that any fact that tends to prove a material issue is relevant. *Pharr,* 115 Wis.2d at 344, 340 N.W.2d at 502.

Here, evidence of Brecht's homosexuality was irrelevant. Although it is true that one of the conditions of Brecht's remaining in the Hartman home was that he not

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[2] Section 904.01 defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

engage in homosexual conduct, the imposition of such a rule approximately one week prior to the shooting fails to establish a motive for murder. If the evidence had established a connection between Brecht's lifestyle and motive, admitting evidence of Brecht's homosexuality may have been justified. In the absence of such evidence, evidence of Brecht's homosexuality was not probative of motive or any other material issue underlying the crime charged. Irrelevant evidence should not be admitted. Section 904.02, Stats. Accordingly, we conclude that the trial court erred by admitting this evidence.

Brecht also contends that the trial court erroneously determined that the state court introduce evidence of his prior worthless check convictions should he open the door to this evidence. During the trial, Brecht advised the court that he intended to call his probation officer, Mrs. Rusch, to testify as to her opinion of his nonassaultive, nondangerous character. A defendant may introduce character evidence of nonviolence. *King v. State,* 75 Wis.2d 26, 38-39, 248 N.W.2d 458, 464-65 (1977); sec. 904.04(1)(a), Stats. The court ruled that should such evidence be introduced, it would permit the state to cross-examine Rusch concerning Brecht's worthless check convictions.

A cross-examination of Rusch concerning Brecht's worthless check convictions is totally unrelated to the question of a character trait of nonviolence. The court therefore erred by declaring that Rusch's testimony would open the door to a detailed recitation of Brecht's prior convictions. *See* sec. 90405(1), Stats.

Judgment reversed.

Supreme Court of Wisconsin.

143 Wis.2d 297

STATE of Wisconsin,
Plaintiff-Respondent-Petitioner,

v.

Todd A. BRECHT, Defendant-Appellant.

No. 86-1317-CR.

Argued Dec. 2, 1987.

Decided March 23, 1988.

BABLITCH, Justice.

The State of Wisconsin (State) seeks review of a court of appeals' decision, *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (1987), that reversed the judgment of conviction for first degree murder entered against Todd A. Brecht (Brecht) by the circuit court for Buffalo county, Judge Peter G. Pappas. The court of appeals based its reversal on the grounds that references to Brecht's pretrial silence during cross-examination and during the State's closing argument impermissibly infringed on Brecht's constitutional rights to silence and to a fair trial, and that such errors were prejudicial.

While we agree that some of the State's references to Brecht's silence were constitutional error, we hold that such error was harmless. In considering the other issues raised on appeal, we conclude that the circuit court properly exercised its discretion in admitting evidence of Brecht's homosexuality because such evidence may have been relevant to the issue of motive. However, the circuit court erred in ruling that the State could cross-examine

Brecht's character witness about Brecht's prior convictions. Nonetheless, we conclude that Brecht was not prejudiced by this error. Accordingly, we reverse the decision of the court of appeals.

On October 17, 1985, Brecht shot and wounded his brother-in-law, Roger Hartman (Hartman), who was the district attorney for Buffalo county, Wisconsin. Hartman died several weeks later. Brecht was arrested on the day of the shooting and subsequently tried by jury. He argued at trial that the shooting was accidental. The jury, however, found him guilty of the first degree murder of Hartman. The following facts are relevant to this appeal.

On October 12, 1985, Molly and Roger Hartman went to the Georgia State prison to secure the release of Molly Hartman's younger brother, Brecht. At that time, Brecht was imprisoned after conviction for a felony theft of $3,750. His release from prison and placement on probation were conditioned on payment of $3,750 in restitution for his theft. The Hartmans paid his restitution and obtained his release and the transfer of his probation to Wisconsin. The conditions of Brecht's probation, as stated in defense counsel's brief, consisted of the following: "1) not violating the law of any government; 2) avoiding injurious and vicious habits – especially alcoholic intoxication, and; 3) not leaving the State without permission."

The Hartmans brought Brecht to their home in Alma, Wisconsin, where he was to stay until an opening in an Eau Claire halfway house became available. The Hartmans told Brecht that while he lived in their home he was to refrain from homosexual activity in the Alma area and from drinking.

Brecht testified that on the day of the shooting he had been drinking and playing with a gun that belonged to Roger Hartman while the latter was at work and Molly Hartman was out shopping. Brecht had been using the gun to shoot at tin cans in the Hartman's yard. After firing the gun, Brecht testified that he saw Roger Hartman pull into the driveway. Because Brecht did not want Hartman to see him with the gun, he ran into the rear garage and entered a downstairs hallway. Brecht explained that he intended to replace the gun in the upstairs room where he had found it.

With the gun in hand, Brecht stopped to listen for Hartman. Hearing nothing, Brecht testified that he started running for the stairs to the upper level when he tripped and the gun discharged. A bullet struck Hartman in the back.

Brecht yelled to Hartman and looked for him but Hartman had disappeared. Brecht then took Molly Hartman's car and drove around the area searching for Hartman. Upon spotting Hartman at the door of a neighbor's house, Brecht drove off in the car. The Hartman car was observed traveling at a faster than normal speed away from Alma and towards Fountain City.

Neighbors of the Hartmans testified that Roger Hartman had come to their house seeking help and told them that Brecht had shot him. Police officers who had surveyed the Hartman residence after the shooting, testified that they had found beer cans in the house, and a liquor bottle and a soda can with a bullet hole in it and spent .22 casing in the backyard. Experts from the State Crime Laboratory testified that Brecht's fingerprints were on an

ammunition box and on a brandy bottle found in the Hartman home. Additionally, it was noted that the doorway area leading into the hallway from the garage was covered with tightly stretched carpet and that nothing was observed on which one could trip.

Meanwhile, Brecht had driven the Hartman car into a ditch near Fountain City, rendering the car inoperable. Officer Zeller arrived and offered Brecht assistance with the car, but Brecht told Zeller that his sister would call a wrecker for him. Brecht subsequently obtained a ride from a stranger, Melvin Schlesselman, to the nearest town, Winona, Minnesota. He did not mention the shooting incident to either Schlesselman or Zeller.

In Minnesota, Brecht was stopped by the Winona police in a shopping center. He falsely identified himself and when his true identity was ascertained, he was arrested by the police for the shooting of Hartman in Wisconsin. Brecht told officer Papke, one of the arresting officers, that it was a mistake and that he wanted to talk with "somebody that would understand [him]." However, neither Brecht's testimony nor that of the police officers' indicate that Brecht explained the shooting incident upon arrest.

The record is unclear when Brecht received his *Miranda* warnings. The State submitted testimony by two of the five officers involved in the arrest, who testified that Brecht was not given his *Miranda* warnings in their presence. However, the record does reflect that Brecht did receive his *Miranda* warnings at his initial appearance.

On November 11, 1985, Hartman died. A coroner testified that the bullet wound was a substantial factor in

producing his death. He also testified that the bullet which entered Hartman's back and exited his chest, traveled on a basically horizontal to slightly downward trajectory.

At trial, the State questioned Zeller, Schlesselman and Papke during its case-in-chief about Brecht's failure to mention Hartman's condition and the accidental nature of the shooting. Additionally, the State attempted to directly impeach Brecht's credibility by cross-examining Brecht on his pre-trial silence concerning the shooting and by making reference to his silence during closing argument.

The State also sought to introduce evidence of Brecht's homosexuality to establish a possible motive for the shooting. The circuit court permitted the introduction of such evidence, over Brecht's objection, noting its relevancy to the issue of motive. During trial, the State produced letters Brecht had written to an inmate in the Georgia prison where Brecht had been incarcerated. The State alleges that one of the letters contained homosexual overtones, a fact Brecht disputes. Additionally, the State elicited testimony from Molly Hartman on Brecht's homosexuality. Molly Hartman testified at trial that her husband had disapproved of Brecht's homosexuality. However, she gave conflicting testimony as to whether her husband had communicated this disapproval directly to Brecht.

Brecht sought to call his probation officer to testify about Brecht's non-violent character. The circuit court ruled that the introduction of such evidence would also permit the State to cross-examine the officer about

Brecht's conviction for writing worthless checks. Consequently, Brecht chose not to call his probation officer and rested his case.

Additionally, both parties stipulated to the filing of ex parte briefs to the court. These briefs were subsequently filed in open court.

The jury found Brecht guilty of first degree murder by use of a dangerous weapon. He was sentenced to life in prison with penalty enhancement for use of a dangerous weapon and for being a repeat offender. Brecht appealed the judgment of conviction.

The court of appeals reversed the conviction on the grounds that the State's references to Brecht's silence impermissibly infringed Brecht's right to silence and to a fair trial, and that such references were prejudicial. The court further concluded that the circuit court erred in admitting evidence of Brecht's homosexuality and in ruling that the State could cross-examine the probation officer on Brecht's worthless checks conviction.

The State subsequently filed a petition to review with this court, seeking reversal of the court of appeals' decision. The petition was granted on July 29, 1987.

The central question presented on review is whether Brecht's constitutional rights to silence[1] and to a fair trial

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[1] Although Art. I, Sec. 8 of the Wisconsin Constitution and the Fifth Amendment of the United States Constitution do not expressly include the phrase "right to silence," that phrase has become a shorthand for describing the rights encompassed within the privilege against compelled self-incrimination and is used in that sense throughout this opinion.

were violated by the State's references to his silence. The references at issue include: 1) elicitation of evidence on Brecht's pre-*Miranda* silence during the State's case-in-chief, 2) references to Brecht's pre-*Miranda* silence after Brecht elected to testify, and 3) comments on Brecht's post-*Miranda* silence during the State's cross-examination of Brecht and closing argument. If such references were constitutional error, we must also determine whether the error was harmless beyond a reasonable doubt. Brecht asserts that references to his silence in all three contexts were constitutional error and prejudicial.

We first consider Brecht's claim that the elicitation of evidence on his silence during the State's case-in-chief violated his right to silence secured under Art. I, Sec. 8 of the Wisconsin Constitution and the Fifth Amendment of the United States Constitution. The references challenged by Brecht consist of testimony elicited from three State witnesses, officer Zeller, Melvin Schlesselman, and officer Papke, during the State's case-in-chief.[2] Because the record does not reflect that Brecht received his *Miranda* warnings until his initial appearance, we treat this testimony as references to Brecht's pre-*Miranda* silence.

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[2] Brecht also objects to the following testimony elicited from deputy Bratner during the State's case-in-chief:

"Q. Did you arrest the defendant?

"A. I served the arrest warrant on him, yes.

"Q. Did you give him Miranda warning?

"A. No."

We conclude that this testimony does not constitute a reference to Brecht's silence and, therefore, do not consider it in our analysis.

The first reference to Brecht's silence was elicited from officer Zeller, the officer who spoke with Brecht when his car was in the ditch.

"Q. Did you speak with this person [Brecht]?

"A. Yes.

"Q. What did you say?

"A. I asked him for his name, and I also asked him if he needed a wrecker, and where he was from.

"Q. What did he respond?

"A. He stated his name was Todd Brecht, and he stated that he was from Alma. In reference to the wrecker he said, 'My sister will get a wrecker from Alma.'

"Q. Did he say anything else?

"A. No."

Brecht asserts that the State made a similar inquiry into his silence on direct examination of Melvin Schlesselman, the individual who gave Brecht a ride to Winona, Minnesota. Schlesselman testified on direct examination by the State:

"Q. At any time during that period of time did he ever ask you to call and (sic) ambulance for anyone?

"A. No sir.

"Q. Did he ever ask you to call the police for him?

"A. No sir.

"Q. Did he ever mention a Roger Hartman to you?

"A. No sir."

Lastly, Brecht objects to the testimony elicited during the State's examination of officer Papke on redirect. Papke was one of the officers who apprehended Brecht in Winona for the shooting.

"Q. Officer Papke did you or anyone else in your presence advise the defendant of his constitutional rights?

"A. No.

"Q. Now you stated he said it was a big mistake – did he say what was a big mistake?

"A. No he didn't.

"Q. Did he offer any explanation about anything whatever?

"A. No.

". . . .

"Q. Was he advised as to why he was being taken into custody?

"A. Yes he was.

"Q. Again you stated what?

"A. I told him he was sought by Buffalo County authorities for a shooting incident in Wisconsin.

"Q. Did he explain anything about a shooting incident to you?

"A. No he didn't.

"Q. To anyone else in your presence?

"A. Not to my knowledge, no."

To ascertain whether these references violated Brecht's constitutional right to silence, we must examine the nature of the right and when it attaches. The proscription against use of a defendant's silence is derived from the privilege against self-incrimination found in art. I, Sec. 8 of the Wisconsin Constitution. *See Rudolph v. State*, 78 Wis.2d 435, 442 254 N.W.2d 471 (1977) (per curiam), citing, *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). This privilege, also guaranteed under the Fifth Amendment of the United States Constitution, provides that "[n]o person may be . . . compelled in any criminal case to be a witness against himself or herself." Wisconsin Const. Art. I, Sec. 8. The United States Supreme Court has broadly construed the fifth amendment privilege to prohibit compelled self-incrimination not only in criminal proceedings but "in all settings in which . . . freedom of action is curtailed in any significant way. . . . " *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966).

As a corollary to the fifth amendment privilege, the Supreme Court has recognized an individual's right to remain silent and not have the exercise of his or her fifth amendment privilege used by the prosecution at trial. In *Miranda*, the Court noted that the prosecution may not use at trial the fact that a defendant stood mute or claimed his privilege in the face of accusation. *Miranda*, 384 U.S. at 486 n. 37, 86 S.Ct. at 1624 n. 37. Similarly, in *Griffin*, the Supreme Court held it was constitutional error for the prosecution to use a nontestifying defendant's

silence against him at trial. *Griffin*, 380 U.S. 609, 85 S.Ct. at 1229. To allow otherwise, the Court reasoned, would penalize the defendant for the exercise of his privilege and erode its protections by making the assertion of the privilege costly. *Id.* at 614, 85 S.Ct. at 1232.

Consistent with this precedent; this court has held that it is a violation of the right to remain silent for the State to present testimony in its case-in-chief on the defendant's election to remain silent during a custodial investigation, after arrest. *Rudolph*, 78 Wis.2d at 442, 254 N.W.2d 471. Further, in *Reichhoff v. State*, 76 Wis.2d 375, 251 N.W.2d 470 (1977), we acknowledged that the right to silence attaches at the time of a defendant's arrest, even though no police interrogation or questioning occurs. *Id.* In that case, we held that it was constitutional error for the State to elicit testimony during its case-in-chief on the defendant's silence upon arrest. Such testimony included statements from an arresting officer that the defendant, "just put his wrists out . . . for the handcuffs and never said a word." *Id.* at 377 n. 1, 251 N.W.2d 470.

More recently, in *State v. Fenel*, 109 Wis.2d 224, 325 N.W.2d 703 (1982), we recognized that the right to silence also attaches when an individual is being questioned by the police, prior to arrest and receipt of *Miranda* warnings. *Id.* In *Fenel*, the State had violated the defendant's constitutional rights by referring to the defendant's pre-arrest, pre-*Miranda* silence in its case-in-chief. As we stated,

> "Any time an individual is questioned by the police, that individual is compelled to do one of two things – either speak or remain silent. if both a person's prearrest speech and silence

> may be used against that person, as the state suggests, that person has no choice that will prevent self-incrimination. This is a veritable 'Catch-22.' . . . We hold that a person is entitled to the protection of the Fifth Amendment even prior to arrest or a custodial interrogation." *Id.* at 237, 325 N.W.2d 703.

Brecht asserts that *Fenel* dictates that all reference to pre-*Miranda* silence violates the protections of the privilege against compelled self-incrimination. Therefore, he maintains that the State's elicitation of testimony on his pre-*Miranda* silence from Schlesselman and Zeller was constitutional error. However, the defendant's silence in *Fenel* occurred prior to his arrest and receipt of *Miranda* warnings, and at a time when the defendant was being questioned by police during a murder investigation. To conclude that Brecht's silence during his encounters with both men was constitutionally protected would extend the right to silence to circumstances beyond those presented in *Fenel*. We decline to so hold.

Rather, we conclude that Brecht's right to silence was not implicated in his encounters with Schlesselman and Zeller. A reasonable person in Brecht's position would not conclude that either of these meetings was coercive or in any way curtailed Brecht's freedom of action. *See State v. Koput*, 142 Wis.2d 370, 378, 418 N.W.2d 804, 808, citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (employing an objective test to assess whether a suspect is "in custody" for purposes of receipt of *Miranda* warnings). Schlesselman was an ordinary citizen, not a governmental officer. Thee was nothing coercive about Brecht's exchange with Schlesselman.

Similarly, officer Zeller's brief inquiry and offer of assistance to Brecht was not coercive nor restrictive of Brecht's freedom. We emphasize that the right to silence is derived from the privilege against *compelled* self-incrimination. Absent circumstances such as those present in *Fenel*, that might compel a reasonable person to speak and incriminate himself or herself, the privilege against compelled self-incrimination does not arise. Thus, the testimony elicited from Schlesselman and Zeller during the State's case-in-chief did not violate Brecht's rights under art. I, sec. 8 of the Wisconsin Constitution and the Fifth amendment of the United States Constitution.[3]

We further conclude that it was not constitutional error for the State to elicit officer Papke's testimony on Brecht's pre-*Miranda* silence during redirect. Brecht had "opened the door" to such inquiry into his silence when Brecht's counsel cross-examined Papke and raised, for the first time, Brecht's statements that it was a "big mistake"

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[3] Brecht also argues that this testimony should have been excluded as irrelevant. We disagree. Brecht's silence about the shooting during his encounters with Schlesselman and Zeller is relevant to the issue of his credibility and the State's theory that if Brecht had accidentally shot Hartman he would have sought help. In contrast to an individual's silence in the face of governmental coercion, where the right to silence is implicated, Brecht's silence under the circumstances presented here is not "insolubly ambiguous." *See Reichhoff*, 76 Wis.2d at 382, 251 N.W.2d 470, (noting that a defendant's custodial silence is "insolubly ambiguous" because such silence may be attributable to the fact that defendant is exercising his right to silence), citing *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

and that Brecht "wanted to talk to someone." Specifically, the following cross-examination occurred,

> "Q. After you had taken him into custody he made a statement to you as you approached the squad car didn't he?
>
> "A. Yes.
>
> "Q. In fact he told you that it was a big mistake, he wanted to talk to someone.
>
> "A. Yes he did.
>
> "Q. He never explained further to you what he meant by 'big mistake', did he?
>
> "A. No he didn't."

Because Brecht's counsel initially raised the issue of Brecht's silence when under arrest, the State was free to subsequently elicit Papke's testimony on Brecht's silence during arrest on redirect. *Accord United States v. Robinson*, ___ U.S. ___, 108 S.Ct. 864, 99 L.Ed.2d 23 (no violation of the fifth amendment for a prosecutor to refer to defendant's failure to testify where such remark is a "fair response to a claim made by the defendant or his counsel"); *United States v. Shaw*, 701 F.2d 367, 384 (5th Cir.1983).

Brecht next contends that his right to silence was further infringed by repeated references to his pre-*Miranda* silence during cross-examination and closing argument by the State. However, based on our recent decision in *State v. Sorenson*, 143 Wis.2d 226, ___, 421 N.W.2d 77, 99, we conclude that such references do not violate a defendant's right to silence under Art. I, Sec. 8 of the

Wisconsin Constitution once the defendant elects to testify. In *Sorenson*, we held that a testifying defendant may be impeached with his pre-*Miranda* silence.[4] *See also Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) (in which the United States Supreme Court declared that the fifth amendment is not violated when a testifying defendant is impeached with his pre-arrest silence). Thus, once Brecht chose to testify, the State was free to refer to his failure to tell authorities about the accidental nature of the shooting without infringing upon his constitutional right to silence.

Finally we address Brecht's claim that the State's references to his post-*Miranda* silence during cross-examination and closing argument violated his right to a fair trial under the due process clause of the federal and state constitutions. Because the record does not show that Brecht received his *Miranda* warnings until the time of his initial appearance, we only consider those comments which encompass his silence after his initial appearance and prior to trial. The first challenged reference to Brecht's post-*Miranda* silence occurred during the State's cross-examination of Brecht,

> "Q. In fact the first time you have ever told this story is when you testified here today was it not?
>
> ". . . .

[4] While the author of this opinion disagreed with the majority's curtailment of the right to silence in *Sorenson*, *see* 143 Wis. at ___, 421 N.W.2d at 93 (Bablitch J., concurring), and continues to adhere to that position, the resolution of this issue is controlled by the holding in *Sorenson*.

> "A. You mean the story of actually what happened?
>
> "Q. Yes.
>
> "A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir."

The State inquired on re-cross examination,

> "Q. Did you tell anyone about what had happened in Alma?
>
> "A. No I did not."

Additionally, Brecht argues that the State's comments during closing argument were constitutional error,

> "and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence. . . .
>
> ". . . .
>
> "He sits back here and sees all of our evidence go in and then comes out with this crazy story. . . .
>
> ". . . .
>
> "I know what I'd say, I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story."

It is well established that it is fundamentally unfair and a violation of a defendant's constitutional right to due process to use a defendant's silence after receipt of

Miranda warnings for impeachment purposes at trial. *Doyle*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (constitutional error to impeach a defendant with his post-arrest, post-*Miranda* silence); *Fencl*, 109 Wis.2d 224, 325 N.W.2d 703; *see also Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) (per curiam) (where the Supreme Court limited its holding in *Doyle* by concluding that due process concerns do not prohibit impeachment with post-arrest, pre-*Miranda* silence), *accord Sorenson*, 143 Wis. at ___, 421 N.W.2d at 89. The basis for this holding is two-fold. First, because an arrestee's silence following *Miranda* warnings may be nothing more than his or her exercise of *Miranda* rights, post-*Miranda* silence is insolubly ambiguous. Second, and more important, it would be fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently offered at trial after he or she has been impliedly assured, by *Miranda* warnings, that silence will carry no penalty. *Doyle*, 426 U.S. at 617-18, 96 S.Ct. at 2244-45.

Brecht's post-*Miranda* silence is, therefore, constitutionally protected at trial. The State's assertions that Brecht did not volunteer his explanation of the accidental nature of the shooting until the State presented its evidence at trial were comments on Brecht's post-*Miranda* silence and as such were constitutional error. We are unpersuaded by the State's attempts to characterize this improper use of Brecht's silence as merely a reference to "the defense tactic of not committing itself to a theory of defense prior to the presentation of the state's case."

Although it was constitutional error for the State to refer to Brecht's post-*Miranda* silence during cross-examination and closing argument, we conclude, contrary to

the court of appeals, that this error does not require reversal. A constitutional error is considered harmless if the court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). This requires that the court find that there is no "reasonable possibility" that the error "contributed to the conviction." *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985); *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827. The relevant factors considered when determining harmless error include: 1) the frequency of the error, 2) the nature of the State's evidence against the defendant, and 3) the nature of the defense. *Rudolph*, 78 Wis.2d at 443, 254 N.W. 471.

In the present case, the improper references to Brecht's silence were infrequent. The four references comprised less than two pages of a 900 page transcript, or a few minutes in a four day trial in which twenty-five witnesses testified. Although the court of appeals emphasized the "length" of the State's comments on Brecht's silence, *Brecht*, 138 Wis.2d at 167, 405 N.W.2d 718, the court was including as error references to Brecht's silence during cross-examination. Because such references were found permissible in *Sorenson*, we limit our evaluation to references to Brecht's post-*Miranda* silence. Although we recognize that such references to a defendant's silence have a high potential for prejudice, *Reichhoff*, 76 Wis.2d at 382, 251 N.W.2d 470, we conclude that in the present case the infrequency of the references in the context of the entire trial mitigated any possible prejudicial effect on the jury. *Accord Fencl*, 109 Wis.2d at 238-39, 325 N.W.2d 703 (six references to defendant's silence during a five day trial were harmless beyond a reasonable doubt).

The other factors to consider are the strength of the evidence against Brecht and the nature of Brecht's defense. It is undisputed that Brecht shot Hartman. Brecht testified at trial that the shooting was an accident. However, the State introduced strong circumstantial evidence that the shooting was intentional, including evidence of motive. Hartman told several persons that Brecht had shot him in the back. Brecht never secured help for Hartman, although he had ample opportunity to do so. Instead, Brecht fled the scene and, ultimately, the state. Additionally, the physical evidence contradicts Brecht's assertion that the shooting was accidental. The horizontal trajectory of the bullet into Hartman's back is inconsistent with Brecht's testimony that the gun accidentally discharged as he was falling. Officers who surveyed the Hartman house after the shooting did not observe anything in the downstairs hallway which would have caused Brecht to trip. As we have noted in previous cases, a finding of guilt may be based upon circumstantial evidence alone. *Rudolph*, 78 Wis.2d at 444, 254 N.W.2d 471.

In conclusion, given the infrequency of the references in the context of the entire trial and the strength of the State's evidence against Brecht, the State's references to Brecht's silence were harmless beyond a reasonable doubt.

The second source of alleged error raised on appeal is whether the circuit court erred in permitting the State to make reference to and introduce evidence on Brecht's homosexuality. Prior to trial, Brecht had brought several motions to bar all references to his homosexuality on the

grounds that such evidence was both irrelevant and prejudicial. The State sought to introduce evidence of Hartman's disapproval of Brecht's homosexuality as a motive for the shooting. In particular, the State sought to question Molly Hartman about her husband's disapproval of Brecht's homosexuality and his communication of this disapproval to Brecht.

The trial court acknowledged the prejudicial nature of such evidence but concluded that it should be admitted because it was relevant on the issue of motive. During trial, the court also permitted the State to introduce letters Brecht wrote to an inmate in the Georgia prison where Brecht had been incarcerated. One letter indicated that Brecht planned to raise $50,000 and obtain his friend's release. Brecht objected to the admission of the letter because of its homosexual overtones and the possibility of prejudice.

The court of appeals held that the circuit court erred in admitting evidence of Brecht's homosexuality. The court of appeals reasoned that such evidence was irrelevant because of the lack of connection between Brecht's sexual preference and motive. However, we conclude that there was sufficient evidence linking Brecht's lifestyle to a motive for the shooting such that the evidence of Brecht's homosexuality was relevant.

A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence. *State v. Pharr*, 115 Wis.2d 334, 342-45, 340 N.W.2d 498 (1983). When reviewing a question on the admissibility of evidence, an appellate court must determine whether the court exercised its discretion in accordance with accepted

legal standards and with the facts of record. *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971). The test is not whether this court agrees with the ruling of the circuit court, but whether appropriate discretion was in fact exercised. *State v. Wollman*, 86 Wis.2d 459, 464, 273 N.W.2d 225 (1979).

Under sec. 904.02, Stats., relevant evidence is generally admissible. The criterion of relevancy is whether the evidence sought to be introduced has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01. This court has recognized that while motive is not an element of any crime it may nevertheless be a proper subject of inquiry and admissible if it meets the same standards of relevance as other evidence. *State v. Berby*, 81 Wis.2d 677, 686, 260 N.W.2d 798 (1978) ("Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it entitled to.").

In the present case, the circuit court found that the evidence referring to Brecht's homosexuality and Hartman's objections to Brecht's homosexuality did suggest a possible motive for the shooting and, therefore, made more probable the State's claim that Brecht had in fact murdered Hartman. The record reflects that Hartman disapproved of Brecht's homosexuality and that this disapproval was conveyed to Brecht by the restrictions Hartman and his wife imposed on Brecht while he lived in their home. These restrictions included that Brecht was to refrain from homosexual conduct and from inviting homosexual friends to the Hartman home. Thus, it is not unreasonable to infer that Brecht's homosexuality, which

prompted restrictions on his lifestyle, could furnish a motive for the shooting.

Moreover, Brecht's correspondence with a fellow inmate in the Georgia prison revealed that Brecht wanted to return to Georgia to obtain his friend's release. While the precise nature of Brecht's relationship with this individual is unclear from the record, Brecht's counsel acknowledged that one of the letters had strong homosexual overtones. It is not unreasonable to infer from this evidence that Brecht planned to return to Georgia, in violation of the conditions of his probation, to aid his friend. Additionally, it is not unreasonable to infer that Hartman, as the district attorney for Buffalo county, may have felt added responsibility in ensuring that his brother-in-law complied with his probation conditions. Thus, Brecht's desire to return to Georgia could also furnish the grounds for a dispute with Hartman and a motive for murder.

Based on the foregoing, we conclude that the circuit court did not abuse its discretion in holding that evidence of Brecht's homosexuality is probative of motive for the charged crime of first degree murder, and that the probative value of this evidence outweighs any possible prejudicial effect. We further note that the circuit court sought to minimize any prejudice to Brecht by instructing the jury on the limited purpose for which the evidence could be considered:

> "The evidence that the defendant is a homosexual . . . was also received solely so you could understand his presence in the Hartman home and the conditions imposed by them.

> "You must not conclude that because he . . . is a homosexual . . . that it is proof that he committed the offense with which he is now charged. That evidence was received only to give you the whole picture of the relationship between him and the Hartmans."

Thus, we reverse that portion of the court of appeals' decision which found an abuse of circuit court discretion in regard to the admissibility of evidence on Brecht's homosexuality.

Brecht also argues that the circuit court erred in ruling that the State could cross-examine Brecht's probation officer on Brecht's worthless check conviction if Brecht called the officer to testify about Brecht's non-violent character. While we agree that this ruling was error, we do not find that the error was prejudicial to Brecht.

Section 904.04(1)(a), Stats., permits an accused to introduce evidence of a pertinent character trait and the prosecution to also introduce evidence to "rebut the same." Section 904.04(1)(a). Evidence of a defendant's character for nonviolence has been recognized as a pertinent character trait in a prosecution for first degree murder. *See King v. State*, 75 Wis.2d 26, 38-39, 248 N.W.2d 458 (1977).

According to the record, Brecht's primary purpose in calling his probation agent as a witness was to have her testify about his non-assaultive, non-violent character. The circuit court ruled that once this testimony was proffered it would "open the door" to the State's cross-examination of the agent on Brecht's worthless check convictions. However, under sec. 904.04(1)(a), Stats., the

State's introduction of character evidence is limited to that which rebuts the character train being established, or in this case, Brecht's character for non-violence. Because Brecht's worthless check convictions are completely unrelated to the character trait of non-violence, the circuit court's ruling was in error.

Nonetheless, while the circuit court's ruling was improper it does not constitute reversible error. Brecht's defense was not undermined by the jury's failure to hear the probation agent's opinion on Brecht's character for non-violence. Additionally, as noted earlier, the State's evidence against Brecht was strong. Thus, in the absence of a reasonable possibility that this error contributed to the jury's decision to convict Brecht, we find that the circuit court's ruling was harmless error. *Dyess*, 124 Wis.2d 525, 370 N.W.2d 222.

Finally, Brecht argues that he was denied a fair trial by the content of the State's ex parte brief submitted to the circuit court. However, upon review of the State's ex parte brief and the record, we conclude that Brecht was not denied a fair trial.

The decision of the court of appeals is reversed.

CECI, J., did not participate.

United States District Court,
W.D. Wisconsin.

Todd A. BRECHT, Petitioner,

v.

Gordon A. ABRAHAMSON, Respondent.

No. 90-C-603-C.

March 14, 1991.

CRABB, Chief Judge.

This is a petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, an inmate at the Dodge Correctional Institution in Waupun, Wisconsin, contends that he is in custody in violation of the Constitution of the United States. Petitioner seeks relief on three separate grounds: 1) that the state's use of his pretrial silence infringed on his Fifth and Fourteenth Amendment rights; 2) that certain rulings by the state court involving evidence of his homosexuality and rebuttal evidence of a prior worthless check conviction violated his due process rights; and 3) that the trial court's reliance on an ex parte trial brief violated his due process rights. Petitioner has exhausted his state remedies as required under 28 U.S.C. § 2254.

After reviewing the entire record, I conclude that references to petitioner's post-*Miranda* silence on cross-examination and in closing argument violated his due process rights and did not constitute harmless error. However, the state's references to petitioner's pre-*Miranda* silence did not infringe on his constitutional rights. Also, I conclude that the state court erred in admitting evidence about petitioner's homosexuality and in ruling

that testimony on a prior worthless check conviction would be admissible to rebut testimony on petitioner's non-violent character. Taken together, these evidentiary rulings are sufficiently prejudicial to violate petitioner's rights to a fundamentally fair trial. Finally, I conclude that petitioner's claim regarding the state's ex parte trial brief has no merit in light of petitioner's consent to the use of ex parte briefs and the absence of improper material in the brief.

In habeas corpus actions, state court findings of fact are presumed correct unless upon consideration of the record as a whole, the federal court concludes that factual determinations are not "fairly supported" by the record. 28 U.S.C. § 2254(d)(8); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1019 (7th Cir. 1987). Petitioner does not object to the accuracy or completeness of the state court findings. Therefore, I adopt the following facts paraphrased from the Wisconsin supreme court's decision in *State v. Brecht*, 143 Wis.2d 297, 421 N.W.2d 96 (1988), and the Wisconsin Court of Appeals' decision in *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (Ct.App.1987), supplemented by pertinent facts from the record.

Facts Found by State Courts

On October 17, 1985, petitioner shot and wounded his brother-in-law, Roger Hartman, who was the district attorney for Buffalo County, Wisconsin. Hartman died several weeks later. At his trial, petitioner testified that the shooting was accidental. However, the jury found him guilty of first degree murder.

Evidence at the trial disclosed the following: on October 12, 1985, Molly and Roger Hartman went to the Georgia State prison to secure the release of petitioner, who is Molly Hartman's younger brother. Petitioner's release from prison and placement on probation were conditioned on payment of $3,750 in restitution. The Hartmans paid his restitution and obtained his release and the transfer of his probation to Wisconsin.

The Hartmans brought petitioner to their home in Alma, Wisconsin, where he was to stay until an opening became available in an Eau Claire halfway house. The Hartmans told petitioner that while he lived in their home he was to refrain from drinking and from homosexual activity in the Alma area.

Petitioner testified that on the day of the shooting he had been drinking and playing with a gun that belonged to Roger Hartman while Hartman was at work and Molly Hartman was out shopping. Petitioner had been using the gun to shoot at tin cans in the Hartman's yard, when he saw Roger Hartman pull into the driveway. Because he did not want Hartman to see him with the gun, petitioner ran into the rear garage and entered a downstairs hallway. Petitioner explained that he intended to replace the gun in the upstairs room where he had found it.

Petitioner testified that he had stopped to listen for Hartman, heard nothing, and started running for the stairs to the upper level of the house when he tripped and the gun discharged. A bullet struck Hartman in the back.

Petitioner yelled to Hartman and looked for him but Hartman had disappeared. Petitioner then took Molly Hartman's car and drove around the area looking for

Hartman. When petitioner saw Hartman at the door of a neighbor's house, petitioner drove off in the car. The Hartman car was observed traveling at a faster than normal speed away from Alma and toward Fountain City.

Neighbors of the Hartmans testified that Roger Hartman came to their door seeking help and told them that petitioner had shot him. Police officers who had surveyed the Hartman residence after the shooting testified that they had found beer cans in the house, and a liquor bottle and a soda can with a bullet hole in it and a spent .22 casing in the backyard. Experts from the State Crime Laboratory testified that petitioner's fingerprints were on an ammunition box and on a brandy bottle found in the Hartman home. There was additional testimony that the doorway area leading into the hall from the garage was covered with tightly stretched carpet and that nothing was observed on which one could trip.

Meanwhile, petitioner had driven the Hartman car into a ditch near Fountain City, rendering the car inoperable. Officer Zeller arrived and offered petitioner assistance with the car, but petitioner told Zeller that his sister would call wrecker for him. Petitioner then caught a ride from a stranger, Melvin Schlesselman, to the nearest town, Winona, Minnesota. He did not mention the shooting incident to either Zeller or Schlesselman.

In Winona, petitioner was stopped by the police in a shopping center. When his identity was ascertained, he was arrested for the shooting of Hartman in Wisconsin. Petitioner told Officer Papke, one of the arresting officers, that it was a mistake and that he wanted to talk with

"somebody that would understand [him]." Neither petitioner's testimony nor that of the police officer indicates that petitioner explained the shooting incident upon arrest.

The record is unclear when petitioner received his *Miranda* warnings. The state submitted testimony by two of the five officers involved in the arrest, who testified that petitioner was not given his *Miranda* warnings in their presence. However, the record does reflect that petitioner received his *Miranda* warnings at his initial appearance.

On November 11, 1985, Roger Hartman died. A coroner testified that the bullet wound was a substantial factor in producing his death. He also testified that the bullet entered Hartman's back and exited his chest, traveling on a basically horizontal to slightly downward trajectory.

At trial, the state questioned Zeller, Schlesselman and Papke during its case-in-chief about petitioner's failure to mention Hartman's condition and the accidental nature of the shooting. Additionally, the state attempted to impeach petitioner's credibility directly by cross-examining him on his pre-trial silence concerning the shooting and by making reference in closing argument to his silence.

The first reference to petitioner's silence was elicited from officer Zeller, the officer who spoke to petitioner when his car was in the ditch.

> Q. Did you speak with this person [petitioner]?

> A. Yes.
>
> Q. What did you say?
>
> A. I asked him for his name, and I also asked him if he needed a wrecker, and where he was from.
>
> Q. What did he respond?
>
> A. He stated his name was Todd Brecht, and he stated that he was from Alma. In reference to the wrecker, he said, "My sister will get a wrecker from Alma."
>
> Q. Did he say anything else?
>
> A. No.

Schlesselman testified on direct examination by the state:

> Q. At any time during that period of time did he ever ask you to call and [sic] ambulance for anyone?
>
> A. No sir.
>
> Q. Did he ever ask you to call the police for him?
>
> A. No sir.
>
> Q. Did he ever mention a Roger Hartman to you?
>
> A. No sir.

On cross-examination of Papke, one of the officers who apprehended petitioner in Winona, petitioner's counsel elicited the following:

> Q. After you had taken him into custody he made a statement to you as you approached the squad car didn't he?

A. Yes.

Q. In fact he told you that it was a big mistake, he wanted to talk to someone.

A. Yes he did.

Q. He never explained further to you what he meant by "big mistake," did he?

A. No he didn't.

In response, the state conducted redirect examination of Papke.

Q. Officer Papke did you or anyone else in your presence advise the defendant of his constitutional rights?

A. No.

Q. Now you stated he said it was a big mistake – did he say what was a big mistake?

A. No he didn't.

Q. Did he offer any explanation about anything whatever?

A. No.

. . . .

Q. Was he advised as to why he was being taken into custody?

A. Yes he was.

Q. Again you stated what?

A. I told him he was sought by Buffalo County authorities for a shooting incident in Wisconsin.

Q. Did he explain anything about a shooting incident to you?

A. No he didn't.

Q. To anyone in your presence?

A. Not to my knowledge, no.

The state elicited testimony from Deputy Bratner during its case-in-chief.

Q. Did you arrest the defendant?

A. I served the arrest warrant on him, yes.

Q. Did you give him [sic] Miranda warning?

A. No.

On cross-examination, the state engaged petitioner in the following exchange:

Q. In fact the first time you have ever told this story is when you testified here today was it not?

. . . .

A. You mean the story of what actually happened?

Q. Yes.

A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

On re-cross examination, the state inquired:

Q. Did you tell anyone about what had happened in Alma?

A. No I did not.

During closing argument, the state made the following comments:

> . . . and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence. . . .
>
> . . . .
>
> . . . he made no statements to the law enforcement officers. . . .
>
> . . . .
>
> He sits back here and sees all of our evidence go in and then comes out with this crazy story. . . .
>
> . . . .
>
> I know what I'd say, I'd say, I'd say "hold on, this was a mistake, this was an accident, let me tell you what happened," but he didn't say that did he. No, he waited until he hears our story.

The state also sought to introduce evidence of petitioner's homosexuality to establish a possible motive for the shooting. The trial court permitted such evidence, over petitioner's objection, noting its relevancy to the issue of motive. During trial, the state produced letters petitioner had written to an inmate in the Georgia prison where petitioner had been incarcerated. Additionally, the state elicited testimony from Molly Hartman that her husband had disapproved of petitioner's homosexuality. However, she gave conflicting testimony as to whether her husband had communicated this disapproval directly to petitioner. The trial court gave the following instruction to the jury:

> The evidence that the defendant is a homosexual . . . was also received solely so you could understand his presence in the Hartman home and the conditions imposed by them.
>
> You must not conclude that because he . . . is a homosexual . . . that it is proof that he committed the offense with which he is now charged. That evidence was received only to give you the whole picture of the relationship between him and the Hartmans.

Petitioner sought to call his probation officer to testify about petitioner's non-violent character. The trial court ruled that the introduction of such evidence would also permit the state to cross-examine the officer about petitioner's conviction for writing worthless checks. Consequently, petitioner chose not to call his probation officer and rested his case.

Both parties stipulated to the filing of ex parte briefs to the court. These briefs were subsequently filed in open court.

After the jury verdict, petitioner was sentenced to life in prison with a penalty enhancement for use of a dangerous weapon and for being a repeat offender. On appeal, the Wisconsin Court of Appeals reversed the conviction on the grounds that the state's references to petitioner's silence impermissibly infringed upon petitioner's right to silence and to a fair trial, and that such references were prejudicial. The court further concluded that the trial court erred in admitting evidence of petitioner's homosexuality and in ruling that the state could cross-examine the probation officer on petitioner's worthless checks conviction.

Additional Facts From The Record

At the pretrial hearing on petitioner's motion in limine to exclude certain evidence, including evidence of his sexual preference, the state represented to the trial court that "Mrs. Hartman didn't have a lot of problem with [petitioner's homosexuality] but Mr. Hartman did and made this known to the defendant. All of this Mrs. Hartman will testify about." The trial court ruled that, despite its prejudicial nature, the evidence had some bearing on the relationship between Hartman and petitioner and a possible motive. At trial, Molly Hartman testified as follows:

> Q. Did [petitioner] tell you that he was a homosexual?
>
> A. Yes.
>
> Q. That week after returning home did you and Roger discuss the homosexuality with Todd?
>
> A. Yes.
>
> Q. On about how many occasions?
>
> A. 3-4 perhaps.
>
> Q. What was Roger's attitude concerning Todd's homosexuality?
>
> . . . .
>
> A. Roger had a hard time accepting it, he could not udnerstand [sic] it.

On cross-examination by petitioner's counsel, Molly Hartman testified further.

> Q. . . . Now you indicated . . . that Roger couldn't understand [petitioner's] homosexuality. Could you explain what you meant by that?
>
> A. Well I guess it's just that way. I guess as far as Roger was concerned he couldn't understand homosexuality, he couldn't understand why that would be a male preference.
>
> Q. Did he express the fact that he could not understand it to Todd?
>
> A. I don't know.
>
> Q. Did he ever do that in your presence?
>
> A. No.
>
> Q. Now you also indicated that Roger had a hard time accepting Todd's homosexuality or bisexuality. Is that the same as not being able to understand it, or is that something different that you were trying to explain?
>
> A. I guess that is a little different.
>
> Q. Could you explain what your understanding was of what was said in terms of how he had a hard time accepting it?
>
> A. I guess it's just the conservative attitude that – he didn't want a brother-in-law who was a homosexual.
>
> Q. Did he openly express this to Todd?
>
> A. No.
>
> Q. Did he ever do so in your presence?
>
> A. No.
>
> Q. So if I understand it then, his attitude of having a hard time in accepting and not being

able to understand it were things that had been Roger's reaction to the things that were communicated to you in private?

A. Yes.

. . . .

Q. Were there ever any cross words between Roger and Todd that you were aware of?

A. I'm not aware of any arguments.

Q. And at the time Todd was there you thought basically that their relationship, yours and Todds [sic], and Todd's and Roger's relationship was a good relationship?

A. Yes.

Molly Hartman also corroborated petitioner's testimony that he had problems walking and jogging because of a previous foot injury.

One of the neighbors who assisted Hartman just after the shooting testified that she asked Hartman whether he thought petitioner had anything against him. Hartman replied, "I don't know."

After accepting the state's petition for review, the Supreme Court of Wisconsin reversed the decision by the Wisconsin Court of Appeals. The supreme court held that the references to petitioner's pre-*Miranda* silence were not constitutional violations. Although it found that the references to petitioner's post-*Miranda* silence did violate petitioner's due process rights, the supreme court found the references to constitute harmless error. In addition, the supreme court concluded that the trial court did not abuse its discretion in admitting evidence of petitioner's

homosexuality, and that it committed harmless error in ruling that the worthless check convictions were admissible rebuttal evidence to the probation officer's proposed testimony on petitioner's non-violent character. Finally, the supreme court concluded that petitioner was not denied a fair trial by the content of the state's ex parte trial brief.

OPINION

Use of Pre-trial Silence

Petitioner contends that all use by the state of his pretrial silence violates his rights under the Fifth and Fourteenth Amendments.[1] The Fifth Amendment right against self-incrimination guarantees a criminal defendant the right to remain silent after he is arrested and precludes the prosecution from commenting on the silence of a defendant who asserts the right. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965). To safeguard Fifth Amendment rights, the Supreme Court requires that a person taken into custody be advised immediately "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney,

---

[1] Petitioner has filed no brief responding to the Wisconsin supreme court decision. The initial brief in support of the petition for a writ of habeas corpus consists primarily of a photocopied copy of the brief filed with the supreme court. Petitioner filed no reply brief to respondent's brief in opposition to the petition.

one will be appointed for him prior to any questioning." *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966).

In a later case, *Doyle v. Ohio*, 426 U.S. 610, 617 96 S.Ct. 2240, 2244, 49 L.Ed.2d 91 (1976), the Court recognized that an arrestee's silence after receipt of *Miranda* warnings may be nothing more than an exercise of the rights explained in the warnings and is thus, "insolubly ambiguous." The Court found it fundamentally unfair for the state to offer implicit assurances in the *Miranda* warnings and then use subsequent silence to impeach an accused's explanation at trial. The Court concluded that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* 426 U.S. at 619, 96 S.Ct. at 2245.

The Supreme Court refused to extend its holding in *Doyle* to use of an accused's pre-arrest, pre-*Miranda* silence. *Jenkins v. Anderson*, 447 U.S. 231, 238-240, 100 S.Ct. 2124, 2129-30, 65 L.Ed.2d 86 (1980) (impeachment by pre-arrest, pre-*Miranda* silence does not violate the Fifth or the Fourteenth Amendment). And, in *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court allowed the government in a murder case to use the defendant's post-arrest silence to impeach his claim that he acted in self-defense, when he had not received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. *Jenkins*, *Fletcher*, and later holdings confirm that *Doyle* rests on the fundamental unfairness inherent in assuring a defendant that he may remain silent and then impeaching him with his silence at trial. *Greer v. Miller*, 483 U.S. 756, 763, 107 S.Ct. 3102, 3107, 97 L.Ed.2d 618 (1987). "Thus, 'absen[t] the sort of affirmative assurances embodied in the *Miranda* warnings,' the Constitution does not prohibit the use of a defendant's postarrest silence to impeach him at trial." *Id.* (quoting *Fletcher*, 455 U.S. at 607, 102 S.Ct. at 1312).

Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has addressed the precise question whether the state's reference to pre-*Miranda* silence in its case-in-chief violates the Fifth Amendment. *Fencli v. Abrahamson*, 841 F.2d 760, 766 (7th Cir.1988). It is clear, however, that only a person subjected to custodial interrogation is entitled to the Fifth Amendment protections embodied in the *Miranda* warnings. *See Berkemer v. McCarty*, 468 U.S. 420, 434, 104 S.Ct. 3138, 3147, 82 L.Ed.2d 317 (1984). A person questioned during a routine traffic stop, for instance, is not "in custody" and *Miranda* warnings are not required. *Id.* 468 U.S. at 442, 104 S.Ct. at 3151.

I turn now to the challenged references to petitioner's silence in this case. I agree with the Wisconsin supreme court that it was constitutionally permissible for the state to refer to petitioner's pre-*Miranda* silence when cross-examining him. *Jenkins*, 447 U.S. at 238-240, 100 S.Ct. at 2129-2130; *Fletcher*, 455 U.S. at 607, 102 S.Ct. at 1312. I agree also that the state's references to petitioner's pre-*Miranda* silence during its case-in-chief did not violate the Fifth or Fourteenth Amendment. Petitioner's encounters with Schlesselman and Zeller were not the type of coercive or custodial situations that invoke the need for Fifth Amendment protection. *See Berkemer*, 468 U.S. at 434, 104 S.Ct. at 3147. Schlesselman is not a police

officer and gave petitioner a ride to a nearby town at petitioner's request. Although Zeller is an officer, his conversation with petitioner was even less coercive than an ordinary traffic stop and did not implicate petitioner's right to silence. The testimony elicited from Deputy Bratner, the arresting officer, made no reference to petitioner's silence.

The questioning of Officer Papke requires a different analysis. The state asked Papke specifically about petitioner's failure to explain the shooting incident after his arrest while he was in custody. However, this inquiry was in response to questions posed by petitioner's counsel. On cross-examination of Papke, petitioner's counsel asked whether petitioner had stated that "it was a big mistake" and "he wanted to talk to someone." Petitioner's counsel also asked whether petitioner had ever explained to Papke what he meant by "big mistake." These questions opened the door to the state's further inquiry about the extent of petitioner's remarks to Papke. *See United States v. Robinson*, 485 U.S. 25, 34, 108 S.Ct. 864, 870, 99 L.Ed.2d 23 (1988) (no Fifth Amendment violation to refer to defendant's silence in fair response to remarks made by defense counsel). The questioning of Papke on redirect examination did not violate petitioner's constitutional rights.

However, the situation is different with respect to the state's references to petitioner's post-*Miranda* silence during its cross-examination of petitioner and in closing argument. These references constitute due process violations under *Doyle*. The clear implication of the state's repeated remarks was that petitioner's failure to explain

the accidental nature of the shooting prior to trial evidenced his guilt. The Wisconsin supreme court recognized that the references were a violation of the Constitution, but found them to be harmless. I cannot agree.

Whether a constitutional error is harmless is a question of federal law. It is not subject to the presumption of correctness given to the state court's findings of fact. *Savory*, 832 F.2d at 1018; *see United States v. Flannigan*, 884 F.2d 945, 950-51 (7th Cir.1989) (federal court not bound by state court's ruling that constitutional error is harmless.) "Constitutional error is reversible error unless it is harmless beyond a reasonable doubt." *United States v. Shue*, 766 F.2d 1122, 1132 (7th Cir.1985) (citing *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) and *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). A district court must determine whether a reasonable possibility exists that the errors complained of might have contributed to the defendant's conviction. *Savory*, 832 F.2d at 1019. The question becomes "whether absent the constitutionally-forbidden evidence, honest and fair-minded jurors might very well have brought in not-guilty verdicts." *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir.1986) (citing *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828).

Respondent had the burden of proving a constitutional error harmless. *Fencl*, 841 F.2d at 768. In most cases, the Court of Appeals for the Seventh Circuit requires that the other evidence of guilt be "overwhelming" before concluding that a constitutional error was harmless. *Savory*, 832 F.2d at 1020; *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir.1988) (error not harmless where evidence of guilt was impressive, but not overwhelming).

In this case, there were at least four occasions during cross-examination and closing argument on which the state made reference to petitioner's failure to explain the accidental nature of the shooting at any time before trial. The Supreme Court of Wisconsin concluded that "the infrequency of the references in the context of the entire trial mitigated any possible prejudicial effect on the jury." *Brecht*, 143 Wis.2d at 318, 421 N.W.2d at 104.

It is true that the references are not extensive and the trial transcript is lengthy, but the state's references to petitioner's post-*Miranda* silence are crucial. Petitioner admitted shooting Hartman. The sole issue for the jury was whether the shooting was accidental or intentional. With the defense hinging on petitioner's credibility, the state's remarks that he simply concocted a "crazy story" at the time of trial may have been determinative.

Moreover, the state's circumstantial evidence that petitioner intended to shoot Hartman falls short of overwhelming. Although Hartman told several people that petitioner had shot him in the back, he also indicated that he knew of no reason why petitioner would shoot him intentionally. Petitioner did not call for help for Hartman and fled in Hartman's car, but this evidence is as consistent with a panic-stricken reaction to a horrible accident as it is with an intentional homicide. Police officers found nothing at the scene that could have tripped petitioner, but both petitioner and Molly Hartman testified to petitioner's foot injury known to trip for no apparent reason. In addition, there is virtually no evidence of motive. In his brief, respondent suggests that "the most probable motive for the murder was the petitioner's desire to raise money for his homosexual friend Darrell Mason and to

obtain his freedom so he could return to Georgia to be with him." It is questionable whether the record supports the proposition that petitioner wanted to leave Wisconsin. Even if it did, this says nothing about petitioner's motive for murdering his brother-in-law. Finally, respondent points to the evidence that the bullet entered Hartman at a horizontal trajectory. This evidence may be inconsistent with petitioner's claim that the shooting was an accident, but it is not conclusive. A rational jury could have believed petitioner's story and reconciled the supposed inconsistencies. *Shue*, 766 F.2d at 1133.

Because the state's effort to present petitioner's story as a recent fabrication by referring to his post-*Miranda* silence may have influenced the verdict, I conclude that respondent has not met his burden of proving that the use of petitioner's post-*Miranda* silence constitutes harmless error. Accordingly, I will grant the petition for a writ of habeas corpus. For the sake of completeness, I will address petitioner's other claims.

Evidentiary Rulings

Petitioner contends that the trial court's evidentiary rulings involving his homosexuality and the testimony of his probation officer violated his due process rights. The admissibility of evidence in a state criminal trial is generally a matter of state law. *Flannigan*, 884 F.2d at 953. A district court can issue a writ of habeas corpus only when an erroneous state evidentiary ruling "is of such magnitude that the result is a denial of fundamental fairness" and consequently, a denial of due process. *Dudley*, 854 F.2d at 970. In deciding whether a writ should issue, a

court must determine whether the probative value of the evidence is greatly outweighed by its prejudicial effect on the accused. *Flannigan*, 884 F.2d at 953.

Respondent contends that the evidence of petitioner's homosexuality was relevant to the issue of motive. In response to petitioner's motion in limine on this issue, the state represented to the trial court that it would provide evidence that Hartman disapproved of petitioner's sexual preference and made that known to him. At trial the state's evidence was that Hartman discussed petitioner's homosexuality with him on several occasions, did not understand or, accept petitioner's homosexuality and restricted him from engaging in homosexual relationships while staying with the Hartmans. Discussing a person's sexual preference and setting restrictions on that person's behavior while staying in one's home are not equivalent to communicating disapproval or condemnation to that person. The state's evidence might be relevant to a possible motive if there was any evidence to indicate that petitioner and Hartman had argued about the restrictions or about petitioner's sexuality. There was none. Molly Hartman testified specifically that her husband never indicated his feelings about petitioner's sexuality in her presence and that she was not aware of any disagreements between petitioner and Hartman.

Respondent argues also that evidence of petitioner's homosexuality was relevant to his motivation for returning to Georgia to help his friend, Darrell Mason. Although respondent asserts that petitioner's counsel admitted that at least one letter petitioner composed to Mason had "homosexual overtones," there is no proof in

the record that petitioner's relationship with Mason was sexual. Even assuming such a relationship, it is difficult to connect petitioner's alleged desire to return to Georgia with a motive for murdering Hartman.

I conclude that the evidence of petitioner's homosexuality was not relevant to any purported motive petitioner had to shoot his brother-in-law. Other courts have recognized that "evidence of homosexuality is extremely prejudicial" in a criminal trial and that even a limiting instruction to the jury is "not sufficient to obviate the prejudice." *United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir.1988).

The question remains whether the erroneous admission of evidence about petitioner's homosexuality was of the magnitude to deny petitioner a fundamentally fair trial. Standing alone, the prejudicial effect might not constitute a denial of due process. However, the trial court also erred in ruling that evidence of worthless check violations would be admissible if petitioner called his probation officer to testify to his non-violent character. As the Wisconsin supreme court noted, Wis.Stat. § 904.04(1)(a) limits the state's introduction of character evidence to that which rebuts the character trait of non-violence. *Brecht*, 143 Wis.2d at 322, 421 N.W.2d at 106. The court held that because petitioner's "worthless check convictions are completely unrelated to the character trait of non-violence, the circuit court's ruling was in error." *Id.* at 323, 421 N.W.2d at 106.

Other than petitioner's own testimony and brief testimony by an officer who observed petitioner after he was

arrested and in jail custody, the probation officer's testimony was to be the only testimony offered for the defense. Evidence that petitioner was non-violent is directly relevant to the central issue whether the shooting was accidental or intentional. The combined errors of allowing prejudicial evidence of petitioner's homosexuality and effectively excluding testimony on his non-violent character are significant in a case lacking overwhelming evidence of guilt. Accordingly, I conclude that petitioner would be entitled to a writ of habeas corpus based on his claim that evidentiary rulings denied him due process.

Ex Parte Trial Brief

Finally, petitioner contends that the trial court's acceptance of the state's ex parte brief constitutes a denial of due process. Petitioner argues that through its brief, the state improperly tried to persuade the court of petitioner's guilt before trial. However, petitioner stipulated to the submission of ex parte briefs and filed his own with the court. I agree with the Wisconsin supreme court that nothing challenged in the state's ex parte brief denied petitioner a fundamentally fair trial. *Brecht*, 143 Wis.2d at 323, 421 N.W.2d at 106. Accordingly, I conclude that petitioner is not entitled to a writ of habeas corpus on the ground that the state's ex parte trial brief violated his right to due process.

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is GRANTED on the grounds that petitioner's right of due process was violated by the state's improper references to petitioner's post-*Miranda* silence and the trial court's erroneous evidentiary rulings. On all other grounds, the petition is DENIED.

Execution of the writ of habeas corpus will be stayed for sixty (60) days from the date of this order to permit the state to provide petitioner a new trial. If petitioner is not provided a new trial within that time, the writ will issue.

United States Court of Appeals,
Seventh Circuit.

Todd A. BRECHT, Petitioner-Appellee,

v.

Gordon A. ABRAHAMSON,
Superintendent, Dodge Correctional Institution,
Respondent-Appellant.

No. 91-1835.

Argued July 10, 1991.

Decided Sept. 26, 1991.

Rehearing and Rehearing En Banc
Denied Nov. 20, 1991.

Before CUDAHY and EASTERBROOK, Circuit Judges, and PELL, Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

Todd A. Brecht was serving time in Georgia for felony theft when his sister Molly Hartman paid the restitution for Brecht's crime and took temporary custody of him while he awaited an opening in a halfway house. This created a sticky situation because Molly's husband Roger was the district attorney for Buffalo County, Wisconsin. There cannot be many public prosecutors who want to have a felon about the house. The awkwardness of putting up the black sheep of the family was augmented by the fact that Brecht, a heavy drinker is also homosexual, which Roger disapproved. The Hartmans explained to Brecht, when they picked him up at the prison gate on October 10, 1985, that there was to be no

drinking or homosexual activity so long as he remained at their home. They reiterated that theme at least twice more before October 17, when Brecht shot and killed Roger Hartman. Wisconsin convicted Brecht of murder and sentenced him to life imprisonment. A district court has ordered him released. 759 F.Supp. 500 (W.D.Wis.1991). Whether the writ of habeas corpus should issue depends on the standard of harmless error employed on collateral review.

I

While Roger Hartman was at work on October 17 and Molly Hartman was shopping, Brecht raided the Hartmans' liquor cabinet for beer and brandy, and their gun cabinet for a rifle. Out in the back yard, Brecht opened fire on some cans. When Roger returned, Brecht shot him in the back and fled in Molly's car. Roger crawled up the hill to a neighbor's house to summon help (the phone on the ground floor of the Hartman home was inoperable, Brecht having taken a receiver off the hook upstairs). Help came, but the injury was too serious; Roger died on November 11. Roger named his assassin to the neighbor and an officer who arrived with the medics. Brecht's initial flight ended after he drove the car into a ditch. When a police officer stopped to inquire, Brecht asserted that Molly Hartman knew about the wreck and had called a tow truck. That lie was coupled with silence about the shooting. Brecht hitched a ride to Winona, Minnesota, where the police nabbed him in a shopping center. Brecht first lied about his identity and when that did not work asked to talk with "somebody that would understand me." He said nothing else.

Come the trial, Brecht admitted shooting Roger Hartman but contended that the rifle discharged by accident. According to Brecht, Roger's return caught him by surprise; he did not want Roger to see him with a gun and raced to take the rifle upstairs before Roger entered the house. He tripped as he was heading toward the stairs, Brecht testified, and the gun went off as he fell. He tried to find Roger to offer aid, Brecht maintained, but Roger had left the house. Only after seeing Roger at the neighbor's door did Brecht drive away in panic, according to his tale.

It is unlikely, but not impossible, that someone would run with his finger on the trigger of a cocked bolt-action rifle. The state thought the path of the bullet dispositive. The coroner testified that the bullet entered Roger Hartman's upper body on a horizontal to slightly downward trajectory, inconsistent with a claim that the weapon was discharged as its bearer was falling. The rifle was found on the patio near the pool (where Roger was shot), not inside near the stairs; a live round was jammed in the chamber (from which a jury could have inferred that Brecht tried to fire another shot). In further response to the defense of the accident, the prosecutor pointed to (a) Brecht's failure to summon aid for Roger; (b) his flight; (c) his lies to the police; (d) his failure to say to anyone, at any time before trial, that the shooting was accidental; and (e) his homosexuality. The first four were offered to impeach Brecht's testimony, and the fifth to establish a motive – hostility to Roger, reciprocating Roger's hostility to Brecht's sexual preference and the ban on its practice in the Hartmans' home. The prosecutor also obtained a

ruling from the trial court that if Brecht called his probation officer in Wisconsin to testify that Brecht lacks a violent disposition, the state could offer into evidence Brecht's conviction for passing worthless checks. Brecht elected not to call the probation officer.

The Court of Appeals of Wisconsin reversed Brecht's conviction. *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (1987). It gave three reasons: first, that the prosecutor's use of Brecht's silence violated both the self-incrimination clauses of the state and federal Constitutions and the due process clause of the federal Constitution; second, that the references to Brecht's homosexuality were unduly prejudicial because the prosecutor was not able to show that Roger Hartman communicated antipathy explicitly to Brecht; third, that the court's ruling on the motion *in limine* was wrong because worthless checks do not establish a propensity for violence. The court concluded that these errors were not harmless.

The Supreme Court of Wisconsin reversed in turn, unanimously reinstating the conviction. 143 Wis.2d 297, 421 N.W.2d 96 (1988). Relying on *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77 (1988), the court rebuffed all claims under the self-incrimination clause of the state constitution, just as *Jenkins v. Anderson*, 447 U.S. 231, 235-39, 100 S.Ct. 2124, 2127-30, 65 L.Ed.2d 86 (1980), had held that use of silence to impeach a testifying defendant does not violate the self-incrimination clause of the federal Bill of Rights. Turning to the due process inquiry, the court observed that prosecutors may use as impeachment silence preceding the delivery of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See *Fletcher v. Weir*, 455 U.S. 603, 102

S.Ct. 1309, 71 L.Ed.2d 490 (1982). Nothing in the record implies that Brecht was told, until his arraignment, that he had a right to remain silent. It follows from *Jenkins* and *Fletcher*, the court held, that the prosecutor could impeach Brecht's testimony at trial by observing that he did not tell anyone before his arraignment the story he told on the stand at trial. Silence at and after the arraignment was another matter under *Doyle v. Ohio*, 426 U.S 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the court thought, because advice that you have a right to be silent implies that silence may not be used against you. Twice the prosecutor asked Brecht whether he told anyone at *any* time before trial that the shooting was accidental; twice the prosecutor remarked in closing argument that Brecht told no one; these four references, the court thought, invited the jury to draw an adverse inference from post-arraignment silence and thus violated the rule established in *Doyle*.

This did not avail Brecht, however, because the court deemed four references in a four-day trial to be peripheral; the error, the court held, was harmless beyond a reasonable doubt. Error in the ruling on the motion *in limine* the court put into the same category. As for the evidence of Brecht's homosexuality: the court held this no error at all. Although Molly Hartman testified that her husband had not "openly express[ed]" his disapproval of homosexuality to Brecht, and that there had been no set-to, she also testified that her husband "didn't want a brother-in-law who was a homosexual." (The district court's opinion reproduces this part of her testimony, 759 F.Supp. at 505.) The Supreme Court of Wisconsin concluded that Roger Hartman's "disapproal was conveyed to Brecht by the restrictions Hartman and his wife

imposed on Brecht while he lived in their home. These restrictions included that Brecht was to refrain from homosexual conduct and from inviting homosexual friends to the Hartman home. Thus, it is not unreasonable to infer that Brecht's homosexuality, which prompted restrictions on his lifestyle, could furnish a motive for the shooting." 143 Wis.2d at 321, 421 N.W.2d at 105.

The district court continued this game of Ping-Pong by issuing a writ of habeas corpus. Chief Judge Crabb agreed with the Court of Appeals of Wisconsin on all issues: she concluded that the comments on Brecht's silence violated the due process clause, that the evidentiary rulings were erroneous, and that none of the errors is harmless beyond a reasonable doubt. We summarize only her grounds of disagreement with the Supreme Court of Wisconsin.

Concerning evidence of homosexuality, the district judge wrote: "Discussing a person's sexual preference and setting restrictions on that person's behavior while staying in one's home are not equivalent to communicating disapproval or condemnation to that person." 759 F.Supp. at 509. The references to Brecht's homosexuality therefore were irrelevant, and, given the subject matter, prejudicial.

Disagreement on whether the references to post-arraignment silence were harmless was driven largely by the different questions the courts asked. The Supreme Court of Wisconsin asked whether these four references added substantial force to the many proper references to pre-arraignment silence and the lies Brecht told to the police; it concluded that the incremental effect was small.

The district court, by contrast, asked whether the evidence against Brecht was irrefutable, stating that "the Court of Appeals for the Seventh Circuit requires that the other evidence of guild be 'overwhelming' before concluding that a constitutional error was harmless." 759 F.Supp. at 508. It then concluded that the evidence against Brecht is less than overwhelming: there was no apparent motive, and the flight may have been inspired by panic rather than a desire to escape. The court wrote that the evidence about the trajectory of the bullet "may be inconsistent with [Brecht's] claim that the shooting was an accident, but it is not conclusive." 759 F.Supp. at 508.

The district court ordered Brecht released unless retried within 60 days. We stayed this order and now become the fourth court in sequence to disagree with its immediate predecessor.

II

This case is here under 28 U.S.C. § 2254(a), which says that a court shall entertain a petition for habeas corpus "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984). See also, e.g., *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1990); *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 948, 71 L.Ed.2d 78 (1982); *Rose v. Hodges*, 423 U.S. 19, 22, 96 S.Ct. 175, 177, 46 L.Ed.2d 162 (1975); *Bates v. McCaughtry*, 934 F.2d 99 (7th Cir.1991); *Bell*

v. Duckworth, 861 F.2d 169 (7th Cir.1988); *Jones v. Thieret*, 846 F.2d 457 (7th Cir.1988). Whether the probative force of Brecht's homosexuality exceeded its potential for improper use, and whether the prosecutor may put a defendant's prior convictions before the jury, are staples in the law of evidence. Errors in admitting or excluding evidence do not violate the Constitution unless the trial as a whole is so infected that the verdict is no longer reliable. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941). But see *McGuire v. Estelle*, 902 F.2d 749 (9th Cir.1990), rehearing denied, 919 F.2d 578 (1990), cert. granted, ___ U.S. ___, 111 S.Ct. 1071, 112 L.Ed.2d 1177 (1991). The district court did not ask whether Wisconsin conducted a trial that was, all things considered, adequate to sift guilt from innocence; it asked instead whether there were errors, and whether these were harmless beyond a reasonable doubt. Given *Donnelly v. De Christoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and *Darden v. Wainwright*, 477 U.S. 168, 106 S.C. 2464, 91 L.Ed.2d 144 (1986), not to mention *Cupp* and *Lisenba*, that is the wrong approach.

Even taking the subjects in isolation, as the district judge did, does not call into question the validity of the state's judgment. Whether the Hartmans' interdict on homosexual acts and homosexual friends at their home conveyed to Brecht Roger Hartman's reprehension of his sexual preference, and thus perhaps engendered Brecht's hostility, is an nice question of inference. A state may choose to give this question to a jury. The district judge substituted her assessment for that of the Supreme Court

of Wisconsin: she did not say that its opinion is unreasoned or beyond the bounds of dispute; she simply disagreed. That is not an appropriate stance for a federal judge engaged in collateral review of a state conviction. "[R]espect for a state court's findings of fact and application of its own law counsels against the sort of *de novo* review undertaken" by the district court. *Lewis*, 110 S.Ct. at 3102.

United States v. Gillespie, 852 F.2d 475, 478-79 (9th Cir.1988), which the district court cited for the proposition that evidence of homosexuality is prejudicial, is another kettle of fish. In a federal prosecution for sexually molesting a three-year-old girl, the prosecution introduced evidence that the defendant had a homosexual relationship with his adoptive father, inviting the inference that anyone departing from the sexual norm is likely to violate little girls. There is no reason to think that homosexuals are likely to be pedophiles; the court properly thought the introduction of this evidence an abuse of discretion under Fed.R.Evid. 404(b). *Gillespie* was not a constitutional decision, and the use made of homosexuality in that case bears no resemblance to its use in this one.

Now for the trial court's ruling that if the probation officer testified, the prosecution could use Bracht's bad-check convictions in cross-examination. The Supreme Court of Wisconsin has determined authoritatively that the court erred under state law. It does not follow that Wisconsin has violated the Constitution of the United States. The district court did not adduce any authority for its conclusion. Brecht's brief in this court likewise offers

no authority, although he does try to distinguish *Michaelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), the state's principal case.

Had the identical subject arisen in federal court, there would have been no reversible error, period. *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), holds that a defendant who wishes to contest a ruling allowing the use of a conviction in cross-examination must present the testimony and endure the cross-examination. Otherwise, the Court concluded, it is impossible to put in context the use made of the conviction and to evaluate a claim of prejudice. Just so here. We have no idea – since the probation officer did not testify, and the convictions were never laid before the jury – how they would have been used, and with what effect, if any, on the trial. We also do not know how vulnerable was the testimony foregone.

It is, at all events, difficult to accept the idea that the Constitution forbids a state to inform the jury of a defendant's prior convictions. Brecht testified, and a federal jury normally learns of a testifying defendant's crimes. Fed.R.Evid. 609(a). Wisconsin does things differently, which may account for the prosecutor's effort to introduce the convictions when examining the probation officer, but this difference hardly makes anathema of the knowledge. Especially not when the witness was going to be the defendant's *probation officer*; it does seem apt to ask such a person what crime the defendant was on probation for. The jury knew from the circumstances of Brecht's presence in the Hartman home that Brecht was a convicted felon; learning that the felony was writing bad checks (as opposed to, say, mayhem or selling drugs) is

an unlikely prospect for constitutional error in a murder case. We turn, then, to the prosecutor's comment on Brecht's failure to say at any time before trial that the shooting was a mishap.

III

"Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative." *Jenkins*, 447 U.S. at 239, 100 S.Ct. at 2129 (citations omitted). If Brecht indeed shot Roger Hartman by accident, he had every reason to tell the police early and often. How else was he to win release from prison – or to ensure that investigators preserved evidence that would support his version of events? Why would an innocent man keep his sister in the dark about the circumstances of her husband's death? Would he not at least apologize for the accident? Silence supports an inference that it took Brecht a while to cook up a story. Fabricated defenses are best withheld until after the state has rested, not only to catch the opposition off guard but also to avoid any blatant inconsistencies with the facts the prosecution adduces.

But for *Doyle v. Ohio*, the prosecutor would have been entitled to ask the questions and argue the case precisely as he did. *Doyle* holds that however natural the inference from silence may be the prosecutor may not undermine the implications of the *Miranda* warnings. A suspect told

that he has a right to remain silent, *Doyle* concluded, may not be bushwhacked by an argument that silence implies guilt. *Fletcher* establishes that *Doyle* applies exclusively to silence after the suspect has been informed about the privilege of silence. Nothing in this record implies that Brecht received such advise before his arraignment. Thus, as the Supreme Court of Wisconsin held, questions and arguments about silence before arraignment are proper, while the questions and remarks in closing argument concerning whether Brecht told his story "at any time" before trial stand condemned by *Doyle*, for they referred in part to post-warning silence. Our question is whether the error was harmless.

A

Whether the error was harmless depends, for reasons discussed later, on what kind of entitlement *Doyle* establishes. Does *Doyle* implement a part of the Bill of Rights, or is it instead a constitutional prophylaxis?

One possibility is that comment on silence violates the self-incrimination clause of the fifth amendment, applied to the states by the fourteenth. No state may compel a person to incriminate himself, which sets up an argument that an inference from silence is a form of compulsion to speak. The defendant made just such an argument in *Jenkins*, and the Court rejected it – at least when the accused testifies, as Brecht did. 447 U.S. at 235-39, 100 S.Ct. at 2127-30. The privilege against compulsory self-incrimination may be waived. *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926), holds that a defendant who takes the stand waives the

privilege to the extent of authorizing questions and comments along the line: Why didn't you tell this story earlier? Raffel testified at his second trial after keeping mum at the first. *Jenkins* holds that *Raffel* is equally applicable when the silence precedes trial. Justice Stevens, concurring in *Jenkins*, doubted the vitality of *Raffel* (treating testimony as a "waiver" is strained) but concluded that comment on silence is not *compulsion* to speak, so there is no privilege to waive. 447 U.S. at 241-45, 100 S.Ct at 2130-33. One way or the other, *Jenkins* shows that what happened at Brecht's trial did not violate the self-incrimination clause.

Doyle suggests a different rationale: Comment on silence threatens the conviction of the innocent, and thus violates the due process clause. The Court remarked that "every post-arrest silence is insolubly ambiguous", 426 U.S. at 617, 96 S.Ct. at 2244, because the suspect may be exercising his constitutional right to silence. This theme came from *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), in which the Court found post-arrest silence too ambiguous to be an appropriate basis of inferences in federal trials. Yet if the suspect was exercising his right to silence, he could explain as much to the jury and so defuse the prosecutor's argument. That silence can carry multiple messages does not make the ambiguity *insoluble*. Few pieces of evidence standing alone support confident conclusions. Trial is an occasion for the cumulation of evidence so that one strand may illuminate another. *Bourjaily v. United States*, 483 U.S. 171, 179-80, 107 S.Ct. 2775, 2780-81, 97 L.Ed.2d 144 (1987); *United States v. Martinez de Ortiz*, 907 F.2d 629, 633 (7th Cir.1990) (in banc).

In the years since *Doyle* the Court had though better of its suggestion that no argument from silence may be presented to a jury. *Jenkins* allowed a prosecutor to urge inferences from pre-arrest silence, remarking that ambiguity "is a question of state evidentiary law." 447 U.S. at 239 n. 5, 100 S.Ct. at 2130 n. 5. *Fletcher* extended this treatment to post-arrest silence by suspects who did not receive *Miranda* warnings. Although one could have said that most suspects know of their privilege to remain silent whether or not the police tell them, and that this knowledge creates the same ambiguity mentioned in *Doyle*, the Court held that difficulties of inference are subjects for state law. *Fletcher* limited the ambiguity rationale of *Doyle* to federal cases, observing that states may draw such inferences as their domestic law permits unless the trial as a whole is fundamentally flawed. 455 U.S. at 604-05, 102 S.Ct. at 1310-11. *South Dakota v. Neville*, 459 U.S. 553, 564-66, 103 S.Ct. 916, 922-24, 74 L.Ed.2d 748 (1983), reinforced this conclusion in holding that a state may draw adverse inferences from a driver's refusal to allow a blood-alcohol test. Then *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), put the icing on the cake by holding the states may not draw even well-justified inferences from post-warning silence. The prosecutor tried to distinguish *Doyle* by observing that the silence in Greenfield's case was not ambiguous, to which the Court replied that probativeness is irrelevant. 474 U.S. at 293-94 & n. 12, 106 S.Ct. at 639-40 & n. 12. The reference to ambiguity in *Doyle*, the Court now observed, just "added weight", *id.* at 294, 106 S.Ct. at 640, to the opinion's real foundation – the desire to prevent the state from undercutting the value of the *Miranda*

warnings. *Doyle* itself said as much, 426 U.S. at 617-18 n. 8, 96 S.Ct. at 2244-45 n. 8, when responding to the dissent of Justice Stevens, who wrote for the Court in *Greenfield*.

Justice White first offered the anti-mousetrapping ground in a brief opinion concurring in *Hale*, 422 U.S. at 182-83, 95 S.Ct. at 2139-40. *Doyle* and all of the opinions in its wake have quoted and adopted this view as the Court's. *Doyle* put it this way:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

426 U.S. at 618, 96 S.Ct. at 2245. *Jenkins*, which allows reference to pre-arrest silence, and *Fletcher*, which allows reference to post-arrest silence if the officers neglected to give *Miranda* warnings, emphasize that the state did not afford – and therefore could not renege on – any assurance that silence is costless. Cf. *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222 (1980) ("*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent."). *Greenfield* reinforces this understanding in the course of explaining, 474 U.S. at 292-94, 106 S.Ct. at 639-40, that even reliable inferences from silence are forbidden because they amount to governmental self-contradiction.

Doyle thus rests on a single proposition: Having implied when giving warnings that silence is safe, the government may not reverse course at trial. The rule of *Doyle* reduces the chance that *Miranda* warnings will injure the persons they are supposed to protect. *Doyle* makes the world safe for *Miranda*. But the warnings required by *Miranda* are not themselves part of the Constitution. They are designed to inform the suspects of their entitlements and so reduce the likelihood of subtle coercion of people in custody. *Oregon v. Elstad*, 470 U.S. 298, 304-09, 105 S.Ct. 1285, 1290-93, 94 L.Ed.2d 222 (1985); *New York v. Quarles*, 467 U.S. 649, 654, 104 S.Ct. 2626, 2630, 81 L.Ed.2d 550 (1984); *Michigan v. Tucker*, 417 U.S. 433, 442-46, 94 S.Ct. 2357, 2362-65, 41 L.Ed.2d 182 (1974). *Doyle* is therefore a prophylactic rule designed to protect another prophylactic rule from erosion or misuse. It has nothing to do with the defendant's guilt and everything to do with insisting that the government play straight with those it prosecutes.

B

Whether the prosecution's violation of *Doyle*'s rule in Brecht's case is harmless beyond a reasonable doubt is a question about which reasonable persons can disagree – have disagreed. The district judge and the three judges of the state's appellate court believe that the error was not harmless under this standard. Six justices of the Supreme Court of Wisconsin reached the contrary conclusion. (The seventh, Justice Ceci, did not participate in the decision.) The district judge thought her inability to deem the evidence "overwhelming" dispositive on the question. Some opinions of this court support such a perspective. E.g.,

United States ex rel. Savory v. Lane, 832 F.2d 1011, 1020 (7th Cir.1987); *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir.1988). "Beyond a reasonable doubt" is an exacting standard. See *Yates v. Evatt*, ___ U.S. ___, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991); *Arizona v. Fulminante*, ___ U.S. ___ 111 S.Ct. 1246, 125?-61, 113 L.Ed.2d 302 (1991). The state, by contrast, submits that errors are harmless when their marginal effect is slight even though the evidence leaves room for debate. This position, too, has some support in our decisions. E.g., *Phelps v. Duckworth*, 772 F.2d 1410, 1413-15 (7th Cir.1985) (en banc); *Fencl v. Abrahamson*, 841 F.2d 760, 769 (7th Cir.1988).

We could trudge through the record and add to the score, making the count anywhere from 9-4 for harmlessness (if we should agree with the Supreme Court of Wisconsin) to 7-6 for the opposite conclusion. The antecedent question, however, is whether collateral review of state convictions in federal court is nothing more than a replay of the direct appeal, as one federal district judge and then three federal appellate judges duplicate the work of the more numerous state judges. Although arguing that duplication of effort should end in its favor, Wisconsin also urges us to revisit the question whether a federal court should apply the "reasonable doubt" standard, derived from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), on collateral review of *Doyle* violations. *United States ex rel. Miller v. Greer*, 789 F.2d 438 (7th Cir.1986) (en banc), used the reasonable doubt test, but the Supreme Court reversed our judgment on other grounds under the name *Greer v. Miller*, 483 U.S 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987), and so deprived our opinion of authority. The Court granted

certiorari to identify the proper standard on collateral attack but did not reach the issue because, it held, there had been no error in the first place. *Id.* at 761 n. 3, 765 n. 6; 107 S.Ct. at 3106 n. 3, 3108 n. 6. Justice Stevens, who alone considered the question on which review had been granted, concluded that a distinct standard of harmlessness applies on collateral review. *Id.* at 767-69, 107 S.Ct. at 3109-11 (concurring opinion). Two other Justices have cited that opinion with approval. *Duckworth v. Eagan*, 492 U.S. 195, 212, 109 S.Ct. 2875, 2884, 106 L.Ed.2d 166 (1989) (O'Connor & Scalia, JJ., concurring). No Justice has taken a contrary view.

Not long ago a majority of this court treated the question as open. In *Hunter v. Clark*, 934 F.2d 856 (7th Cir.1991) (en banc), two judges concluded that the reasonable doubt standard should not be employed in the collateral enforcement of prophylactic rules. *Id.* at 865-66 (concurring opinion). Four other judges called the concurring opinion "persuasive" and remarked that it "may well be correct" but found it unnecessary to essay a final decision. *Id.* at 859 n. 1 (plurality opinion). The other five members of this court did not discuss the question. See also *Hanrahan v. Greer*, 896 F.2d 241, 244-45 (7th Cir.1990) (calling question open but avoiding resolution because argument had not bee preserved in district court); *Fencl*, 841 F.2d at 766-67 n. 6 (flagging question but avoiding resultion). Judges of this court have been bandying the subject about for six years, ever since *Phelps* was decided in September 1985. Although *Savory*, 832 F.2d at 1016-17 & n. 2, reiterated the approach of *Miller*, subsequent developments, especially the reservation in *Hunter*, permit renewed attention. No interest of the judicial system

(or the parties) would be served by postponing yet again resolution of a question the Supreme Court thought certworthy in 1987. The State has asked us to apply the standard of *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986), and *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946), under which only an error that exerts substantial influence on the course of the trial and produces actual prejudice to the accused vitiates the judgment. By ignoring this request, Brecht has forfeited any possibility that the state neglected to preserve the claim in the district court. (The defendant made a vigorous waiver argument in *Hanrahan*, quite unlike Brecht's strategy. We do not know whether Wisconsin made this argument to the district judge and shall not endeavor to find out.)

The standard of "harmlessness" has never been a unitary one. Contrast *Lane* with *Chapman*. It varies with the nature of the underlying right, the tools available to correct the violation at trial, and the number of layers of review. *Chapman* establishes that the standard an appellate court should employ on direct review is whether the error is harmless beyond a reasonable doubt. Does this carry over to collateral attack? The Supreme Court has never addressed that question.

We know from *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), that § 2254 does not require federal courts on collateral attack to employ for every constitutional claim the same standards state courts must use. *Stone* holds that when a defendant invokes the exclusionary rule that has been devised to implement the fourth amendment, a federal court should inquire only

whether the state gave the defendant a full and fair opportunity to litigate the claim. Error in application does not support a writ of habeas corpus. *Stone* observed that the exclusionary rule is an extra-constitutional device that helps motivate adherence to the fourth amendment, but that exclusion is not itself compelled by the Constitution. See also, e.g., *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); cf. Henry P. Monoghan, *The Supreme Court, 1974 Term – Forward: Constitutional Common Law*, 89 Harv.L.Rev. 1 (1975). It followed, the Court held, that federal courts engaged in collateral review need not replicate the efforts of the judges of the state tribunals; it is enough to ensure that states adjudicate these claims. It may well be that the Court will establish a similar system for claims under *Miranda*, which like the exclusionary rule depends on prudential rather than textual or historical support. Justice O'Connor (joined by Justice Scalia) so argued in *Eagan*, 492 U.S. at 205-14, 109 S.Ct. at 2881-86, and the majority left the issue open. 492 U.S. at 201 n. 3, 109 S.Ct. at 2879 n. 3. If *Miranda* ultimately joins the exclusionary rule, claims under *Doyle* are logical companions, for just as *Miranda* creates a buffer around the self-incrimination clause, so *Doyle* creates a buffer around *Miranda*.

Selecting a deferential standard by which to assess harmlessness is an alternative to confining collateral review as tightly as *Stone* does – an alternative that leaves the federal court with substantially greater power to ensure that the state court is taking seriously its obligation to enforce the substantive rules. It is a middle ground between federal review that duplicates the direct

appeal and federal review that is, after the fashion of *Stone*, next to no review.

For most of this nation's history "next to none" was an accurate description of collateral review of state judgments. Section 14 of the Judiciary Act of 1789 gave the federal courts jurisdiction to issue writs only when person were held in federal custody. 1 Stat. 81-82. In 1867 a Congress concerned about the behavior of states that had joined the Confederacy extended federal power to state prisoners. 14 Stat. 385-86. In 1867, as in 1789, the writ ran only to release persons held without authority – that is to say, without "jurisdiction." See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 463-69 (1963). One convicted by a tribunal with jurisdiction over subject-matter and person could obtain no collateral relief, however grievously the tribunal erred. Shortly after Congress extended federal power the state prisoners, the Supreme Court began pouring more into the vessel of "jurisdiction". In 1915 the Court equated a kangaroo court with lack of jurisdiction, *Frank v. Mangum*, 237 U.S. 309, 330-35, 35 S.Ct. 582, 288-90, 59 L.Ed. 969 (1915), and by 1942 the distinction between "no jurisdiction" and "grievous error" had eroded so substantially that the Court discarded the limitation. *Waley v. Johnston*, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942) (conviction based on coerced confession). Not for a further 11 years, however, did the Court first use collateral review as a supplement to direct appeal, re-deciding procedural questions (already fully considered by the state court; until *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), it had been

necessary to show an error of special gravity that undermined confidence in the verdict. That is to say, the device through which the Court expanded review beyond strictly jurisdictional claims was to equate omission of those procedures central to the protection of the innocent with the lack of jurisdiction.

If the fifteen years that followed *Brown* witnessed an extraordinary extension of federal review of state judgments, the fourteen years since *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), have experienced a movement in the other direction. *Sykes* held that forfeitures in state court also block review in federal court unless the defendant shows both external cause and prejudice – not simply that the error had an adverse effect, but that it could threaten the conviction of the innocent. Cf. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970). *Stone* effectively eliminated collateral review of claims under the fourth amendment. Recently the Court overruled *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 937 (1963), one of the milestones in the expansion of collateral review. *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991) (observing that *Fay* "was based on a conception of federal/state relations that undervalued the importance of state procedural rules."). See also, e.g., *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) (enlarging the doctrine of "abuse of the writ").

Today – as for most of our history – the Court puts considerations of finality and federalism at the forefront of any discussion of the scope of collateral review. One who seeks that review must justify the federal role; it is

not enough to cry "Constitution!". There are many shades of constitutional rules; those that protect the accuracy of the fact-finding process receive the greatest protection; rules that may be found in the text (such as the self-incrimination clause), even though they promote values other than accurate resolution of factual contests, receive greater protection than doctrines that courts have devised in the penumbras of constitutional rules. We deal with such a penumbral doctrine – one that until *Brown* would not have been open at all on collateral review.

In deciding how (even whether) a federal court should examine the state's decision concerning such a supplementary doctrine, we could recite themes of federalism and finality – but these are so trumpeted in recent opinions such as *McCleskey* and *Coleman* that repetition would be tendentious. See also, e.g., *Teague v. Lane*, 489 U.S. 288, 308-09, 109 S.Ct. 1060, 1073-74, 103 L.Ed.2d 334 (1989); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-55, 106 S.Ct. 2616, 2626-28, 91 L.Ed.2d 364 (1986). One dominant theme is that doctrines protecting the innocent, and claims of actual innocence, receive special protection. See *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986) (the "cause and prejudice" preconditions to collateral review of claims forfeited in state court do not apply "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."); *Kuhlmann*, 477 U.S. at 452-54, 106 S.Ct. at 2626-27 (showing of probably innocence is condition of second review of same issue). Three additional practical considerations stand out.

First, collateral review followed by a new trial means delay, often extended. Passage of time diminishes the

courts' ability to resolve factual disagreements accurately. Trials long after the event, when memories have faded, are less likely to convict the guilty and acquit the innocent. More: at a new trial there will be opportunities for new errors, which may be as bad as the error in Brecht's trial. Sometimes inaccuracy hurts the defendant, but more often it counts against the prosecution, which bears the burden of persuasion, and thus against the public interest in the accurate enforcement of the law. When the constitutional blunder diminished the accuracy of the factfinding process, then retrial even after many intervening years may make a just resolution more likely; when the constitutional entitlement is one that tolerates a reduction in accuracy (as does the self-incrimination clause) in pursuit of other objectives, again the costs of deferred trial may be worth bearing. When the rule neither promotes accuracy nor can be located in the Constitution itself – when the foundation of the doctrine is avowedly prudential – then courts must take into account all of the costs as well as the benefits. Delay makes it substantially more costly to enforce a prophylactic rule such as *Doyle* on collateral attack than on direct appeal, which implies a corresponding adjustment in doctrine. See Thomas W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U.Chi.L.Rev. 1, 53 (1985).

Second, federal courts, knowing the high costs of ordering retrials many years after the events, may be inclined to dilute the standard of harmlessness while retaining the "reasonable doubt" formula, excusing errors that would not be tolerated on direct appeal. A careful reader of our opinions would find some traces of this. E.g., *Hanrahan v. Thieret*, 933 F.2d 1328, 1336 (7th

Cir.1991). State courts reading these opinions then relax their own vigilance, an unhappy consequence that could be avoided by distinguishing the standards of harmlessness on direct and collateral review.

Third, while federal courts re-do the decisions already made by state courts, federal business languishes. Time to review closed cases may be had only at the expense of time to decide pending ones. Serving as super-appellate tribunals in the state system, federal courts necessarily devote less time to cases that have yet to receive an initial decision. Less time per case means an increased chance of error. It also means a longer queue, during which disputes fester and memories fade, impairing the federal courts' ability to resolve accurately cases pending on their primary dockets. In some federal districts civil trials have become exceptional events. There are many causes of this, but each contributes at the margin, and each segment of judicial business must justify its imposition on resources the judicial system cannot control or augment.

Selecting a standard for assessing harmless error, no less than deciding when the prosecutor can use evidence the Constitution says he should not have at all, requires an assessment of the marginal benefits and costs of enforcement. The difference between a *Chapman* standard of review on collateral attack and a *Kotteakos* standard is not likely to impair the enforcement of *Doyle*. Recall that *Kotteakos* supplies the standard – whether an error "had substantial and injurious effect or influence in determining the jury's verdict", 328 U.S. at 776, 66 S.Ct. at 1253; see also *Lane*, 474 U.S. at 449, 106 S.Ct. at 732 – that

federal courts use in evaluating claims that federal statutes and rules have been violated in federal trials. No one believes that it affords insufficient protection to these federal norms. Under any of the competing definitions, the substantive rule (and review under the most stringent standard in state court) informs prosecutors that an effort to draw the jury's attention to the defendant's silence reduces the chance of conviction, and tells trial judges how to respond to the prosecutors' efforts. These two messages, unaffected by the standard of harmless error, are the principal advantages of the rule. When the rule is as far removed from protecting the innocent as is *Doyle*, there is no need for the strict enforcement that the *Chapman* standard creates.

C

What we have said would be academic if Congress or the Supreme Court has directed the application of the *Chapman* standard on collateral review. But neither institution has done this. Congress has been silent on the standard of review. Indeed, with the exception of 28 U.S.C. § 2254(d), Congress has been silent on most procedural questions. See John C. Jeffries, Jr. & William J. Stunt, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U.Chi.L.Rev. 679, 707-09 (1990). *Chapman* was a direct appeal, as are most of the other cases in which the Supreme Court applied the "reasonable doubt" standard to state convictions. That the standard of harmless error may vary between direct and collateral appeal is a commonplace. For example, a violation of Fed.R.Crim.P. 11, which establishes procedures for taking guilty pleas, is enforceable on direct appeal by

almost automatic reversal. *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). On collateral attack, however, Rule 11 is enforceable only to the extent that the disregard of its provisions makes the proceedings fundamentally unfair. *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). The difference is not attributable to the nonconstitutional status of Rule 11, for the Rule is a "law," and the pertinent statute, 28 U.S.C. § 2255, allows collateral attack on the ground that a person is in custody "in violation of the Constitution or laws of the United States". See *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). The change in the standard of review instead rests on the conclusion that one round of review is sufficient unless something has gone very wrong indeed. Collateral review is not supposed to be a replay of the direct appeal, *Sunal v. Large*, 332 U.S. 174, 181-82, 67 S.Ct. 1488, 1492-93, 91 L.Ed. 1982 (1947), a point emphasized when the Court held in *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), that blunders that could support reversal as "plain error" on direct appeal do not support collateral relief.

The same may be said for review of state convictions. See *Henderson v. Kibbe*, 431 U.S. 145, 154 & n. 13, 97 S.Ct. 1730, 1737 & n. 13, 52 L.Ed.2d 203 (1977), which holds that only in the rarest of cases will an instruction to which no objection was made at trial support collateral attack, even though the same instruction might have been "plain error" on direct appeal. Ordinary trial errors (even constitutional ones) that might lead to reversal on appeal do not support collateral review in federal court unless

the trial as a whole has miscarried, impugning the accuracy of the judgment. See, e.g., *Darden*, *Donnelly*, *Cupp*, and *Lisenba*. Expressions throughout the *Doyle* line imply that the Court believes these cases salient. E.g., *Fletcher*, 455 U.S. at 605, 102 S.Ct. at 1311 (citing *Cupp* for the proposition that the ambiguity of silence supports a new trial only when it degrades the accuracy of the fact-finding apparatus); *Miller*, 483 U.S. at 765-67, 107 S.Ct. at 3108-10 (applying the *Donnelly* approach to determine whether a prosecutor's efforts to argue inferences from silence violate *Doyle* at all).

So far as we can tell, only twice has the Supreme Court used the *Chapman* standard on collateral attack. The first time, *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the central question was whether an unconstitutional burden-shifting instruction *ever* could be harmless error. The Court held that it may be deemed harmless under the *Chapman* standard. The second time, *Yates v. Evatt*, required the Court to refine its holding in *Rose*, which was not entirely consistent in its explanation of *Chapman*. See 111 S.Ct. at 1892 & n. 8. *Yates* held that the Supreme Court of South Carolina erred in withholding collateral relief when it employed a standard of harmlessness at variance with *Chapman's*. *Yates* illustrates the value of the *Chapman* standard when the constitutional rule is designed to protect the innocent from wrongful conviction. South Carolina s trial court had charged the jury in a murder case not only that malice could be presumed from the use of a deadly weapon but also that malice could be presumed when the death occurs in the course of an unlawful act. Both of these presumptions had been declared unconstitutional because they allowed

the state to evade its burden of proving guilt beyond a reasonable doubt. See *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The state court, on remand from *Yates v. Aiken*, proceeded to misstate the facts and all but thumb its nose at the opinion reversing it. (It had earlier denied relief to Yates without even citing the federal cases – and this despite a remand by the Supreme Court with instructions to apply *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). See 111 S.Ct. at 1890.) So the Supreme Court again granted review and reversed, explicating the meaning of *Chapman* in burden-shifting cases.

Yates v. Evatt presents a striking contrast with our case. First, *Yates* dealt with constitutional rules designed to protect the innocent. Such rules give the strongest justification for independent federal review. *Doyle* is a penumbral rule. Second, *Yates* addressed a state court apparently unwilling to accept the federal norm; Wisconsin, by contrast, has applied *Doyle* conscientiously. Federal courts should discourage recalcitrance and reward full consideration – which they cannot if they review every constitutional claim from scratch. *Yates* reinforces rather than shakes our conviction that the "reasonable doubt" standard, compelling the state to justify the judgment with the same burden it bears before the jury in the first instance, is out of place in the collateral enforcement of prophylactic rules.

D

We hold that the standard of harmlessness on collateral enforcement of prophylactic rules is the one stated in *Kotteakos* and *Lane* – whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776, 66 S.Ct. at 1253; see also *Lane*, 474 U.S. at 449, 106 S.Ct. at 732. The Court added in *Kotteakos* that "if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 765, 66 S.Ct. at 1248. This amply protects the federal interest – and the defendant's – in enforcing rules that are unrelated to the protection of the innocent.

We recognize that *Bass v. Nix*, 909 F.2d 297, 304-05 & n. 14 (8th Cir.1990), has elected not to apply the *Kotteakos-Lane* approach to collateral review of *Doyle* errors. *Bass* is founded on a belief that the "insoluble ambiguity" language of *Doyle*, which is directed to the protection of the innocent, still represents the Supreme Court's view. As we have shown, it does not; today the probative value of inferences from silence is a question of state law. Because *Bass* rests on a misunderstanding of the justification of the *Doyle* rule, we respectfully decline to follow it.*

Application of our approach is straight-forward. Brecht does not contend that the four references to his post-arraignment silence had "substantial and injurious

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* Because this opinion creates a conflict among the circuits and changes the standard used in this circuit, it was circulated before release to all judges in active service. See Circuit Rule 40(f). A majority did not favor hearing in banc. Chief Judge Bauer and Judges Wood, Cudahy, Flaum, and Ripple voted to hear the case in bank.

effect" and could not do so with a straight face, given the many more, and entirely proper, references to his silence preceding arraignment. Brecht's sole submission, tracking the district court's conclusion, is that once any constitutional error has occurred, the judgment must be set aside unless the evidence is "overwhelming", which Brecht submits it is not. As we have rejected that approach, we conclude that the violation of *Doyle* does not support a writ of habeas corpus.

REVERSED

CUDAHY, Circuit Judge, concurring in the judgment.

I concur in the judgment.

The majority opinion pursues with considerable eloquence and skill a subject in which its author has evinced a burning interest for a number of years. *Cf. United States ex rel. Miller v. Greer*, 789 F.2d 438, 448 (7th Cir.1986) (in banc) (Easterbrook, J., dissenting), *rev'd on other grounds*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *Hunter v. Clark*, 934 F.2d 856, 865 (7th Cir.1991) (in banc) (Easterbrook, J., concurring).

In *Hunter*, our most recent in bank encounter with the problem of the standard for harmless constitutional error in collateral review, Judge Easterbrook was joined only by Judge Posner.

Judge Eschbach's statement in *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1016-17 (7th Cir.1987), still accurately states Seventh Circuit law:

> With respect to the admission of statements petitioner made to police without the benefit of

> the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the standard for harmless error need not detain us long. Errors of constitutional magnitude are grounds for reversal unless they are "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also, e.g., United States ex rel. Miller v. Greer*, 789 F.2d 438 (7th Cir.1986) (en banc), *rev'd on other grounds*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *see also United States ex rel. Allen v. Franzen*, 659 F.2d 745, 748 (7th Cir.1981). While the state suggests that perhaps some other standard is appropriate to habeas corpus actions, the law in this circuit is plainly otherwise. Although the Supreme Court was presented with an opportunity to resolve this issue in *Miller*, it found it unnecessary to reach the issue, holding instead that there had been no constitutional violation at all. Accordingly, the "harmless beyond a reasonable doubt" standard remains the law in this circuit, even where the errors are challenged on collateral review.

Judge Wood in *Hanrahan v. Thieret*, 933 F.2d 1328, 1336, 1337 n. 17 (7th Cir.1991), endorses the same general position:

> Constitutional error does not require automatic reversal. On the contrary, an otherwise valid conviction need not be set aside if the error is harmless. As the district court correctly stated, however, the standard is strict indeed. A court must be able to say confidently on the record that the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828; *United States v. Hill*, 898 F.2d 72, 75 (7th Cir. 1990).

The same opinion continues, "The Supreme Court has yet to overrule or formally modify *Chapman* . . . and we must continue to respect its holding until that day." *Id.* at 1337 n. 17.

Given this precedent, I do not believe – whatever its merits – that this is an open question.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

November 20 , 1991

Before

Hon. Richard D. Cudahy, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Wilbur F. Pell, Jr., Senior Circuit Judge

Todd A. Brecht, *Petitioner-Appellee,* No. 91-1835 V. Gordon A. Abrahamson, Superintendent, Dodge Correctional Institution, *Respondent-Appellant.*	)	Appeal from the United States District Court for the Western District of Wisconsin. No. 90-C-603-C Barbara B. Crabb, *Chief Judge.*

Order

Petitioner-Appellee filed a petition for rehearing and suggestion of rehearing en banc on October 10, 1991. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and a majority of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

United States Court of Appeals
for the
Seventh Circuit

91-1835

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v.	)	the Western District of
	)	Wisconsin
Gordon A. Abrahamson,	)	90 C 603
	)	Judge Barbara B. Crabb
Respondent-Appellant	)	Presiding

Petition for Rehearing with Suggestion for Rehearing En Banc

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United States Court of Appeals
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Petition for Rehearing with Suggestion for Rehearing En Banc or in the alternative a Request for Modification of the Opinion, and Judgment to Remand the case to the district Court for Application of the Standard Announced in the Panel Decision

This is a case of exceptional importance, for it involves the standard of review of *Miranda* related claims on habeas petitions in federal courts: the panel decision created a conflict of law between this circuit and the Eighth Circuit in *Bass v. Nix*, 909 F.2d 297 (8th Cir. 1990) as well as a refusal to apply the harmless error standard articulated by the Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967), which been left undisturbed by any holding of the United States Supreme Court and last assumed in *YLST v. Nunnemaker*, 59 U.S. Law Week 4808, n. 2 (June 25, 1991) in the opinion for the court by Justice Scalia as still cognizable in habeas.

The panel decision in this case is a startling example of the adversarial process going fundamentally awry. Neither the facts nor the legal conclusions and standards

stated in the panel opinion have been subjected to comment and analysis by either attorneys for the Appellee or Appellant.

The panel opinion notes that it had been circulated to all Judges of he [sic] Seventh Circuit because it creates a conflict between the circuits and changes the standard of review in the circuit. In that panel opinion fully 83 percent of all case authorities (65 cases) cited by the court's opinion had neither been cited by the State of Wisconsin nor by Petitioner-Appellee. No law review articles cited in the opinion were cited by either side. Indeed, the change of standard stems from a single footnote invitation to reconsider the harmless error standard contained in Wisconsin's brief on appeal. (Wisconsin did in fact fail to raise that issue at the District Court level, but Counsel for Petitioner-Appellee inadvertently, and incorrectly, believed it had.) No further argument appeared in Wisconsin's briefs. The state's briefs focused, as did Petitioner-Appellee's brief, on the application of the harmless error standard.

Briefing in this case was extraordinarily expedited. Wisconsin filed its original brief on May 24, 1991. Counsel on appeal was not appointed by this court until May 29, 1991. Counsel was required to immediately respond to a substantial motion by Wisconsin to stay release. Appellee's response to Wisconsin's release motion was filed on June 7, 1991. The court granted the government's stay motion on June 18, 1991, and on that same date, without prior notice to counsel for Petitioner-Appellee, ordered both expedited briefing and set oral argument. Petitioner's brief was due by noon of June 24, 1991, and oral argument set for July 10, 1991. Petitioner's attorney had

less than 5 days actual notice of the due date of the brief and responded as best possible during that time period considering the extensive record involved.

The difficulty of the case under review is illustrated by the fact that each court in turn to consider the case has reversed the decision of the court which last decided it. Such reversals indicate the closeness of this case, a single issue case: i.e. Whether Todd Brecht *intentionally* killed his brother in law, the District Attorney of Buffalo County, Wisconsin?

There was no contest as to who shot Mr. Hartman, nor was there any contest or dispute about where the shooting took place until the panel decision in this case moved the site of the shooting in blatant disregard for the record. If Mr. Hartman was not shot intentionally, Wisconsin has already held Mr. Brecht beyond the maximum sentence for the lesser offense charged to the jury.

The statement of facts in the panel opinion startlingly and substantially misstates the record, and in substantial part disregards the record. These misstatements are so serious that it is impossible to understand that a difficult task would remain in applying the new standard to the complex facts of the case to the only issue at dispute – *intent*.

At oral argument it was distinctly insisted, and Todd Brecht continues to insist, that under any standard of review short of complete deference to the last state court decision, Mr. Brecht is still entitled to the grant of the writ under federal law. This includes the standard articulated for the first time in this case (a standard which differs from that asserted by Judge Easterbrook in dissent in,

U.S. ex rel. Miller v. Greer, 789 F.2d 438, at 448 (7th Cir. 1986) which was either: " 'had substantial influence' on the course of the trial . . . ," or " 'actual prejudice' . . . a significant likelihood of altering the verdict.").

The panel opinion fails to mention the only direct testimonial statement by Roger Hartman, made shortly after the shooting, in direct and apparently full conscious response to a neighbor's question, "Did he [Todd Brecht] have something anything against you?" "ANSWER, I DON'T KNOW." (Record 164, 175)

The prosecution tried to fill this lacunae on intent with theories of motive based on homosexuality, either irritation about conditions for staying in the Hartman house until another facility would be available, conditions restricting his drinking or homosexual activity in the house, or cupidity, (with a hint of homosexuality) i.e. Brecht's sister would inherit Hartman's property and Brecht could then bail out a "brother" from jail in Georgia. (Brecht would then need $1,000)

The government's lever to move the jury to its view on intent was Todd Brecht's total lack of credibility (R. 608, 619, 791); the lever's fulcrum was Brecht's failure to label the shooting an accident prior to hearing the government's case at trial, [Although Brecht's attorney had stated in opening argument Brecht's accident defense in considerable detail, details that coincided with Brecht's actual testimony to the jury]; and the heaviest weight on that lever were the inferences, surmises and theories based upon Todd Brecht's admitted homosexuality.

Each and every reviewing court has found that federal constitutional error had been committed through the

state's adverse comments on silence that embraced the period after arraignment at which Miranda warnings were first documented to have been given.

Besides the important new ruling of law, the panel of this court made new and creative findings of fact, and inferences of fact which themselves cannot withstand adversarial testing (many of these findings of fact and theories have never been advanced by the state). Many findings of fact and arguments are squarely contradicted by the evidence actually admitted at trial, as well as contradictory to the theories and arguments actually advanced by the prosecution at trial.

Among other startling items asserted for the first time in the panel opinion are the following:

1) The site of the killing is moved from inside the house to outside the house (Opinion p. 3, "near the pool (where Roger was shot)";

a) This ignores uncontradicted physical evidence including the spent bullet and cartridge shell found inside the house about 240 inches apart (R. 240, 252, 224, 250-252, 246, 298).

b) It also ignores the *only* argument by the state to suggest a theory different from the defendant's as to where the shooting occurred, an ambush theory also set inside the house but at a slightly different place on the basement (or lower) level, R. 810, (responded to at R. 845). The prosecution neither argued nor suggested the shooting took place anywhere other than inside the house. Indeed, the prosecution stated the shooting took place inside the house in its

opening and closing statements (R. 116, 812, 881).

c) Most importantly it ignores Roger Hartman's own statement, "I sneaked out the basement door . . . " (R. 167) which puts the shooting inside the house. Persons at the house where Roger sought assistance also understood the shooting took place in the basement and told police offers that (R. 221).

2) A pool is moved around the house to the patio side (sometimes referred to as the porch), "The rifle was found on the patio near the pool (where Roger was shot)" (Opinion, p. 3). Nowhere in the record is the patio stated to be near the pool although such confusion is understandable considering the complex testimony in the case and the failure to have a single exhibit on appeal diagramming the house. (The opinion also moves the master bedroom from one floor to another; see item 9 below.)

3) The opinion fabricates a non-existent, "raided" gun cabinet (Opinion, p. 2) as the source of the weapon, although all testimony indicates guns were stored inside bedroom closets, and the weapon involved came from Todd Brecht's bedroom closet, (R. 406, 582, 267-68).

4) Cans of beer that are testified to have come from a refrigerator (R. 581), instead come from a liquor cabinet never mentioned in the record, (Opinion p. 2), (liquor bottles were underneath a bar (R 573, 274, 127). Neither gun cabinet nor liquor cabinet appears anywhere in the record.

5) The word "assassin" was introduced as if it was used by the decedent (which it was not), and indeed the

only time anything vaguely similar to such a word was employed, the word "assailant," the trial judge ordered the word struck from the record. (R. 154)

6) The caution by the Hartmans that Brecht was not to engage in homosexual activity at their home is dramatized by the panel opinion as "at the prison gate," (Opinion p. 2) which contradicts the only specific information in the record, Molly Hartman's possibility that it was discussed on the ride home from Georgia to Wisconsin (R. 417) and Todd Brecht's statement that it was discussed on the way back from Georgia (R. 571). (The importance of the house rule is thereby dramatized by suggesting that Brecht would have remained in prison if he didn't accept this house edict!)

7) Highly probative facts are ignored, including the statement by Mr. Hartman that he didn't know what reason Brecht may have had against him, (R. 164, 175), and that the Todd Brecht, despite his motivation from cupidity, fled the scene without weapon, credit card, or checks, but with 25 cents in his pocket. (R. 361, 364 (or $1.30, according to Brecht (R. 598))

8) The court describes Brecht as a heavy drinker, a term neither used by witnesses nor by attorneys.

9) Unclear facts are stated as givens. These facts include a finding that Brecht made the phone system inoperative by taking a phone off the hook upstairs (Opinion p. 2) [which also moves the Hartman bedroom from downstairs to upstairs: The phone in the kitchen wall was on the hook, (R. 222, 244) police went downstairs where there was a bedroom, (R. 223) a master bedroom (R. 247, 253) where the phone was off the hook

(R. 255), which is the level at which the shooting took place.] In fact Todd Brecht testified he could not remember leaving the phone off the hook (R. 645) [Indeed, it was not until October 8, 1991, that it occurred to counsel for Mr. Brecht that the open phone in the downstairs bedroom could have been caused by Mr. Hartman between the time he was shot, and the time he sneaked out of the basement to seek aid at a neighbors house. (R. 883) During this period of time it is clear that Todd Brecht did not know where Roger Hartman was. This argument is also one never advanced to the jury, thus outside the record, but also is more consistent with the trial record than many of the theories advanced by the panel opinion.]

Most of these particular inaccuracies were artfully employed by the panel opinion to suggest irrefutable evidence of an intentional killing.

Other inaccuracies include the statement, "Twice the prosecutor asked Brecht whether he told anyone at *any* time before trial that the shooting was accidental . . . " (p. 4) Such questions were in fact 'never' asked of Mr. Brecht.

The actual questions of Brecht are contained in the District Court opinion at 759 F.Supp. 504.

Such fundamental factual problems in exploring the complex record in this case demonstrate the wisdom of the ordinary appellate practice of leaving primary responsibility for factual analysis to trial courts, and limiting the role of appellate panels to scrutiny of the results of the trial court. The danger of error is real if a judge

with a "burning interest" in an issue (Concurring Opinion p. 25), however important the particular issue, makes the case fit the issue.

The principal issue of law decided in the panel opinion (an issue on which 5 judges voted to rehear en banc,) was mentioned only in a brief footnote to the government's initial brief. At oral argument, brief discussion of the substance of alternative standards of review on habeas took place. Petitioner's position was that under any standard of review chosen by the court, including, the standard set out in the panel opinion, a retrial was required because the constitutional errors fundamentally tainted the truth finding function of the jury at Petitioner's trial.

The panel decision in this case resolves an important issue of federal law and creates a conflict between the circuits on the basis of virtual total absence of briefing and argument about the important policy and legal matters involved. In the short time available to file a brief in this case, Petitioner responded with a statement of the existing standard, and subsequently by letter noted a recent Supreme Court decision which inferentially continued the validity of that standard, *Yates v. Evatt*, 111 S.Ct. 1884 (1991). Counsel was not aware of the footnote in *YLST v. Nunnemaker*, 59 L.W. 4808, 4810, n.2 (1991) which reflects the court's assumption that *Miranda* claims were still cognizable on habeas at least as of June 25, 1991. (*YLST* was not cited in the panel opinion.)

There are substantial legal issues that Appellee would request permission to brief that are important to its consideration of the proper role of federal courts in

exercising habeas corpus jurisdiction. The panel opinion states that the Supreme Court has overruled *Fay v. Noia*, 372 U.S. 391 (1963) citing *Coleman v. Thompson*, 111 S.Ct. 2446, 2565 (1991). That is incorrect, although some other courts have also drawn the same conclusion.

Fay v. Noia, was indeed modified by the adoption of a cause and prejudice test in *Francis v. Henderson*, 425 U.S. 536 (1976), and *Wainwright v. Sykes*, 433 U.S. 72 (1977), and most recently *Coleman v. Thompson*, 501 U.S. ___, 115 L.Ed. 2d 640, 111 S.Ct. ___ (1991). Indeed, review of the specific holdings stated in *Fay v. Noia* by Justice Brennan at 372 U.S. 398-399 indicates that most of *Fay v. Noia* continues to be an accurate description of habeas corpus law, and in particular federal jurisdiction continues to exist in section 2254 cases. The fundamental relationship of state and federal law contemplated by *Fay v. Noia*, has not been drastically altered, certainly not as much as premature reports of *Fay v. Noia's* demise might indicate.)

What is true about *Fay v. Noia*, is that specific applications such as the deliberate bypass test are no longer applicable and instead a cause of prejudice test applies. *Coleman v. Thompson*, 501 U.S. ___, 115 L.Ed. 2d 640, 669, 111 S.Ct. ___. Until either the Supreme Court or Congress acts further, the essence of *Fay v. Noia* persists and that is a command that federal courts are to scrutinize the basis for detention *simpliciter*.

However, the present case doesn't involve any argument regarding failure to raise and preserve constitutional allegations.

It is also true that although *Fay v. Noia* has been substantially modified by subsequent decisions of the

Supreme Court, its original holdings as then stated, are surprisingly unmodified and remain at the core of Section 2254 jurisprudence. *Fay v. Noia's* major impact was recognition of the fundamental reallocation of federal and state power accomplished by Section 2254.

That is the major issue presented by the panel opinion in this case: The proper allocation of federal and state power in this area.

Fifth amendment rights to remain silence [sic] are not *just* constitutional claims, they are a fundamental protection against government overbearance upon the individual. The *Miranda* guarantee that relates to the right to remain silent is fundamentally different from *Stone v. Powell,* 428 U.S. 465 (1976) issues. Unconstitutionally obtained physical evidence does not lose its capacity to demonstrate truth through police malfeasance. A gun or bag of cocaine doesn't become untrue just because the constable blundered.

That is not the case with compelled utterances from defendants, or with penalizing the right to remain silent. Such penalties exert just that form of governmental overbearance that is at the core of the Fifth Amendment privilege. On the one hand, silence is itself neither "true" nor "untrue" regardless of whatever half-baked psychological assumptions some people may believe. Neither is speech itself always true, including confessions to murder. Indeed, counsel is aware of the intense skepticism of Chicago homicide detectives to homicide confessions. Frequently such persons, even after passing lie detector tests, have been demonstrated not to have committed a murder, usually by finding the actual murderer along

with physical or other evidence establishing truth in the matter.

Brecht's statements prior to trial are not at issue in this case. They include his statements to or overheard by police that it was a "big mistake" (R. 721, 723), or his telephone conversation from the jail on the night of his arrest that "he didn't want to shot [sic] anybody, and didn't mean to kill anybody, and didn't mean for anybody to get murdered" (R. 727). [Nor does this explain the government's failure to attempt to rebut Brecht's claimed statement on the night of arrest to his stepfather that it was an accident (R. 601) (By calling his stepfather).] [It is also unclear in the record why another statement by Brecht was not submitted to the jury, a statement shortly after his arrest that "he was always running from something he did not do." (R. 60)]

The undisputed issue in this case is the potential effect on the jury of the state's repeated use of Brecht's silence to impeach him before the jury with comments and questions that clearly violated his constitutional rights.

The essence of the writ of habeas corpus is testing the legality of restraint of an individual.

By denying the application of the adequate and independent state ground doctrine, *Fay v. Noia* held that a case or controversy existed permitting federal courts to decide the *original* Section 2254 action. Such cases are *not* a further level of appeal of state criminal actions. Section 2254 cases continue to be "original civil remedies for the enforcement of the right to personal liberty." As stated in *Fay v. Noia,* "The jurisdictional prerequisite is not the

judgment of a state court but detention simpliciter." 372 U.S. 430, 9 L.Ed. 2d 864. *Coleman v. Thompson*, itself recognizes a continued, albeit narrowed, role for federal courts in such cases.

Until either Congress or the Supreme Court decides that the scope of the fundamental writ should be narrowed, a writ so fundamental it was not left to the bill of rights but mentioned in the original body of the Constitution, (Article I, Section 9, cl. 2, Suspension Clause) and included in the Judiciary Act of 1789, Section 14, 1 Stat. 81, 82., with all due respect it is submitted this court should not act to limit that writ. It is particularly inappropriate when the request was neither presented to the U.S. District Court, nor briefed to this court. The apparent rush to judgment presented in the appellate representation of Todd Brecht accentuates the problem.

Moreover, the reason for not speaking first asserted at trial by Todd Brecht distinctly was that he did not want to give up his rights by speaking. (759 F. Supp. 504) This is an assertion that he did not want to give up a right, understandable in context as a federal right, which presents the type of claim recognized in *Carrington v. Rash*, 380 U.S. 89 (1965). Such a claim parallels the first use of habeas corpus against state custody, a use that predates the 1867 federal statute discussed in the panel opinion at 16-17. That use was to protect persons acting under federal authority who were being detained in state custody, a reaction to the North Carolina Nullification ordinance. Force Act of March 2, 1833, c. 57, sec. 7, 4 Stat. 434, 435. See, *Fay v. Noia*, 371 U.S. 401, n. 9.

Since the panel opinion fails to identify any opinion of a Justice of the Supreme Court suggesting the application of the standard adopted by the panel to *Miranda* right to silence claims, since it appears to have ignored the *YLST* footnote announced on the same day as *Coleman v. Thompson* indicating such claims retained vitality, and since the adversarial process has so fundamentally gone awry in this case:

The Appellee respectfully requests a rehearing and suggests a rehearing en banc; in the alternative, Appellee requests that this court modify its opinion to correct the many errors unsupported by the record and remand this case to the District Court for consideration of the application of this court's standard to the facts of the case. In the event that either rehearing is ordered or the suggestion for rehearing en banc is accepted, it is suggested that Appellee be permitted to file a brief on the appropriateness of any alteration of the harmless error standard, the appropriateness of alternative standards, and the application of alternative standards to the facts of the instant case. Appellant should be given similar opportunity to file briefs.

Respectfully submitted,

/s/ Allen E. Shoenberger
Allen E. Shoenberger
Court Appointed Counsel

Supreme Court of the United States

No. 91-7358

Todd A. Brecht,

Petitioner

v.

Gordon A. Abrahamson, Superintendent,
Dodge Correctional Institution

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 by the petition.

June 8, 1992